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Rival Unionism  
in the  
United States

by

Walter Galenson

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NEW YORK / RUSSELL & RUSSELL

1966

*Sum*

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## P R E F A C E

I wish to acknowledge my incalculable debt to Professor Paul F. Brissenden of Columbia University for his patient aid and criticism. Without his help, both as teacher and friend, the completion of this work would have been infinitely more difficult. Valuable suggestions were offered by Professors Eveline Burns, Walter Gellhorn, Archibald Stockder and Leo Wolman, all of Columbia University, who were kind enough to read the manuscript. I wish also to thank Miss Marjorie Spector of the New York State Department of Labor for making the manuscript more intelligible both in form and content; Mr. William Garlock, Esq., of New York City, who shared in the arduous task of proof reading; and Miss Julia Kohn, for her expert typing.

Special acknowledgement is due to the Appleton-Century Co., Inc., Harcourt-Brace and Co., Harper & Brothers, the Macmillan Company, and the publishers of the books and periodicals listed in the bibliography, for permission to quote copyrighted material.

It is scarcely necessary to add that I am solely responsible for all statements of opinion expressed herein.

WALTER GALENSON

New York, 1940.

**TO MY MOTHER AND FATHER**

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## INTRODUCTION

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Rival unionism is the coexistence of two or more unrelated labor organizations actively competing for the control of the workers employed or the work habitually performed within a particular trade or occupation. A situation of this nature should not be confused with dual unionism, which merely implies coexistence without the further fact of competition. In a sense, dual unionism is the genus of which rival unionism constitutes a subordinate species. A rival union is dual, but a dual union not necessarily rival. Whitney clearly makes this distinction when he defines a dual union as "an organization which claims the right to maintain itself as a body independent of, and *usually* rival to, another association controlling the same classes of workmen and operating within the same territory."<sup>1</sup> [*Italics mine.*]

Although there is a clearly marked distinction between the two terms, they are widely employed as synonyms. The American Federation of Labor, for instance, generally refers to the C.I.O. as a "secession, dual, rival movement."<sup>2</sup> The courts habitually confuse them. While the strict separation of these concepts would be desirable, it has not always proved feasible in the following pages for the reason just stated. Where, however, any apparent or latent ambiguity might result from failure to discriminate, the terms are used in accord with the above definitions.

A jurisdictional dispute, which is to be sharply distinguished from a rival union controversy, is one between competing labor organizations acknowledging allegiance to a common parent. The important additional element is the existence of an agency to

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<sup>1</sup> Nathaniel Ruggles Whitney, *Jurisdiction in American Building-Trades Unions* (Baltimore, 1914), p. 65. Also, 44 *Monthly Labor Review* 292, 297, February, 1937: "The independent organization was identical in jurisdiction to one of the affiliated organizations, but confined its activities to the plants of a single company so that although they were dual they were not rival organizations."

<sup>2</sup> e.g., American Federation of Labor, *Proceedings*, 1938, pp. 86-93.

which the dispute may be referred for settlement. Many courts and the National Labor Relations Board differentiate on this basis. The New York State Labor Relations Act excepts from the jurisdiction of the State Labor Relations Board "any question or controversy between . . . labor organizations affiliated with the same parent labor organization"<sup>3</sup> while providing for intervention in rival union disputes. Jurisdictional disputes will receive little consideration in the following pages except insofar as they constitute a contributing cause to the formation of rival unions.<sup>4</sup>

The difference between a "secessionist" and a "rival" union need scarcely be pointed out. Mere withdrawal from a federation of labor organizations does not in itself operate to create duplication of jurisdictional claims. Finally, none of the above terms includes controversies between trade unions and company unions,<sup>5</sup> conflicts of this type being generally relegated to a separate category.

To make extensive comment upon the significance of rival unionism in the United States would be to footnote the obvious. The economic and social dislocations resulting from division in the ranks of labor are daily shouted in newspaper headlines. Workers suffer ill-spared wage losses and destruction of hard-won collective bargain-

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<sup>3</sup> Cahill's Consolidated Laws of New York, Laws 1937, c. 443, Section 705(3).

<sup>4</sup> Controversies between labor unions not affiliated with a common parent are commonly termed "jurisdictional disputes" when the issues involved are similar to those in the jurisdictional disputes defined in the text. It is not particularly useful, however, to attempt to distinguish between rival union disputes of a "jurisdictional" nature and other types of rival union disputes. All such controversies are inevitably concerned with questions of jurisdiction, so that any division would be a quantitative and not a qualitative one.

On the other hand, jurisdictional disputes are certainly not devoid of rivalry. Fratricidal warfare can be every whit as severe as competition between strangers. Nevertheless, the term "jurisdictional" is employed in describing this type of difficulty because the presence of a parent organization introduces a novel and important element that may greatly affect the outcome.

<sup>5</sup> The United States Bureau of Labor Statistics defines the company union as "an organization of workers confined to a particular plant or company and having for its purpose the representation of employees in their dealings with management." *Characteristics of Company Unions*, Bulletin No. 634 (1935), p. 3. Here, however, the term is used more colloquially, and implies as a further attribute of this type of organization domination by the employer. Independent unaffiliated locals will be so designated.

ing rights.<sup>6</sup> The innocent employer, caught in the crossfire of competing labor organizations, may suffer the disruption of his business despite his readiness to bargain. The people in the community, although accepting employer-employee strife as a functional adjustment of the modern industrial system, may be completely alienated by the seeming futility of fratricidal warfare, by the "stagnation of trade, the atmosphere of fear and oppression, the inconvenience, want, and actual danger which have resulted from this war, undeclared but ever present."<sup>7</sup>

Nor is interunion rivalry a purely recent phenomenon. Although adequate statistical material is lacking, the discussion in the following chapters will reveal that for many years before the current split, rival unionism was a not inconsiderable factor. As the history of rivalry unfolds, its effect upon the extent and scope of labor organization, and the character and psychology of contemporary labor leaders will be more clearly seen.<sup>8</sup>

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<sup>6</sup> "As long as the employees are so divided, satisfactory collective bargaining will not be possible." Sumner Slichter, "The Government and Collective Bargaining," *Annals of the American Academy*, March, 1935.

" . . . . The experience of American unionism has been that, with some few exceptions, whenever 'radical' or merely impetuous local leaders defied their own union constitution with an 'outlaw' strike, or where factions have broken away to form a more 'progressive' rival to the old union, the resulting fratricidal war, including mutual 'scabbing,' has always led to an all around defeat of labor, and to a total collapse of all organization." Commons, John R., *et al.*, *History of Labor in the United States* (New York, 1935), vol. iv, p. 7.

<sup>7</sup> *M. & M. Woodworking Co. v. Plywood and Veneer Workers Union*, 23 F. Supp. 11 (1938). This comment referred to the fight between the Carpenters and the Woodworkers in Oregon and Washington.

<sup>8</sup> While the importance of rival union controversies should not be minimized, neither should they be exaggerated. The experience of the National Labor Relations Board has been that "strikes or other interference with an employer's business, growing out of jurisdictional disputes, have been greatly overemphasized . . . cases have been rare where employers subject to the Act have suffered from jurisdictional disputes. The same is true of controversies between rival organizations. Where the employer has maintained an impartial attitude and refrained from assisting either organization it has been an exceptional situation where the controversy has interrupted the employer's business." *Report of the National Labor Relations Board to the Senate Committee on Education and Labor upon S1,000, S1,264, S1,392, S1,550 and S1,580* (1939), p. 136.

## THE HISTORY OF RIVAL UNIONISM IN THE UNITED STATES

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The formation of the American Federation of Labor in 1886 may serve as a convenient point of departure for a brief survey of rival union movements in this country. The trade union leaders who gathered at Columbus, Ohio, in December of that year were prompted by fear of engulfment by the Noble Order of the Knights of Labor, an increasingly uncomfortable competitor. The Federation of Organized Trades and Labor Unions, created in 1881, had proved unnecessary and unsuccessful because, as yet, the Order was attracting "elements which the trade unions were either not desirous to get . . . or isolated mechanics in small localities whom they were unable to reach."<sup>1</sup> Dualism there was, but the vast reservoir of unorganized workers precluded serious conflict. However, in the course of the next few years, the rapidly expanding Knights began to step on the toes of the trade unions. Sponsorship of the Progressive Cigar Makers Union by District Assembly 49 of the Knights of Labor as a secession movement from the Cigar Makers' International Union made an implacable foe of Samuel Gompers.<sup>2</sup> The carpenters, the building trades men, the furniture workers were joining the Knights.<sup>3</sup>

A conference of the trade unions met at Philadelphia in the early part of 1886 to prepare a treaty of peace with the Knights. Had the Order accepted the terms that were offered,<sup>4</sup> it would have become a mere educational appendage to the trade unions.<sup>5</sup> Instead, its response invited all trade unionists to join the Order, and pro-

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<sup>1</sup> Commons, *op. cit.* at chap. i, n. 6, p. 352.

<sup>2</sup> Norman J. Ware, *The Labor Movement in the United States* (New York, 1929), pp. 259 ff.

<sup>3</sup> Samuel Gompers, *70 Years of Life and Labor* (New York, 1925), p. 256.

<sup>4</sup> American Federation of Labor, *Proceedings*, 1886, p. 16.

<sup>5</sup> This was clearly the aim of the latter. "The platform of the K. of L.

posed joint conferences whenever the two organizations found themselves competing over questions of wages and hours.<sup>6</sup> The result was the final consolidation of the trade unions into the A.F. of L.

The following year witnessed increasing friction. Mutual strike-breaking and undercutting became the order of the day.<sup>7</sup> For a time the leaders remained friendly. In 1887, amid great applause, President Gompers reported: "There is no conflict necessary between the trades unions and the Knights of Labor . . . . Let us hope that the near future will bring them back to the fold."<sup>8</sup> Nevertheless, the battle lines were drawn more firmly when the Executive Council of the Federation recommended militant resistance to encroachments by the Knights.<sup>9</sup> In 1888 President Gompers complained that it was the policy of the K. of L. "when a Trade Union has had a dispute between their employer and themselves, to throw the influence of their organization against the toilers."<sup>10</sup> A year later the Knights proposed mutual recognition of working cards and labels, and the exclusion from each organization of expelled or suspended members of the other, an offer that was countered with the demand that the Knights discontinue all dual unions.<sup>11</sup> With righteous indignation, the Federation's Special Committee on Relations With Other Organizations denounced the K. of L.'s refusal to commit suicide as the action of "ambitious and unscrupulous persons [seeking] to trench upon the rightful prerogatives of the trade unions and subordinate the legitimate labor movement to the aggrandisement of personal ambition."<sup>12</sup>

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shows clearly that it was never intended to be other than an educational organization. Thus it can have no legitimate place in the field occupied by trade unions." American Federation of Labor, *Proceedings*, 1891, p. 49.

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<sup>6</sup> The full text of this reply may be found in Ware, *op. cit.* at n. 2, Appendix iii.

<sup>7</sup> Commons, *op. cit.* at chap. i, n. 6, vol. ii, p. 484, footnote 40; Louis Levine, *The Women's Garment Workers* (New York, 1924), pp. 68-72; Louis Lorwin, *The American Federation of Labor* (Washington, 1933), p. 28; Ware, *op. cit.* at n. 2, chap. ix and *passim*.

<sup>8</sup> American Federation of Labor, *Proceedings*, 1887, p. 11.

<sup>9</sup> *Ibid.*, p. 28.

<sup>10</sup> American Federation of Labor, *Proceedings*, 1888, p. 14.

<sup>11</sup> American Federation of Labor, *Proceedings*, 1889, p. 14.

<sup>12</sup> *Ibid.*, p. 36.

The tide was running against the Noble Order, however, and its star declined rapidly. The loss of a number of strikes, internal political machinations, a rather inept leadership, and the depredations of the Pinkertons, contributed to its supersession by the Federation. When in 1891 it renewed the peace offer made several years previously, it received a similar reply, the rejection of which was termed "discourteous and insolent."<sup>13</sup> A final conference, held in St. Louis in 1894, found the A. F. of L. unyielding in its determination to maintain strict trade autonomy.<sup>14</sup> Thereafter, an A. F. of L. convention resolution urging conference with the Knights was tabled without opposition, since the latter had ceased to exercise any influence.<sup>15</sup>

The outcome of this conflict has been ascribed to the strategic position of skilled craftsmen at a time when industrial concentration was still in its infancy.<sup>16</sup> Subsequent technological changes, plus the many dissimilar elements in the setting, render comparisons with the present division in the labor movement a dubious undertaking.

In the middle of the 90's, just about the time that the Knights of Labor was breathing its last, a new rival to the Federation, the Socialist Trade and Labor Alliance, appeared. Organized by Daniel De Leon after his attempt to capture the remains of the K. of L. had narrowly failed, it was designed to replace the wage conscious trade unions with a more radical industrial organization.<sup>17</sup> Although some 200 charters were issued, the membership, consisting

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<sup>13</sup> American Federation of Labor, *Proceedings*, 1892, p. 17.

<sup>14</sup> American Federation of Labor, *Proceedings*, 1894, p. 57. The report of the committee to meet with the Knights of Labor, which expressed this policy, was adopted with the following amendment: "That the American Federation of Labor holds itself in readiness to meet at all times with sincere men in the reform movement, but refuses to meet with the Knights of Labor as at present constituted, and until that body recognizes the principle of trade autonomy, and ceases to encourage dual authority in any one trade."

<sup>15</sup> American Federation of Labor, *Proceedings*, 1895, p. 76.

<sup>16</sup> Louis Levine, "Development of Syndicalism in America," 28 *Political Science Quarterly* 451 (1913).

<sup>17</sup> David J. Saposs, *Left Wing Unionism* (New York, 1926), p. 28. The author wishes to acknowledge his debt to this treatise for many ideas expressed in the following pages. Wherever possible, specific acknowledgment has been given.

largely of ex-Knights, never exceeded 20,000.<sup>18</sup> In 1905 the S. T. & L. A. joined in the formation of the Industrial Workers of the World.

In 1897 the Western Federation of Miners, which had joined the A. F. of L. only two years before, organized the Western Labor Union, which was originally intended to function as a strictly sectional dual federation. "The dualism of the West was a pragmatic dualism springing . . . from geographic isolation and the need of the miners for reliable allies on the ground."<sup>19</sup> Competition with the A. F. of L. soon arose, however, and a change of name to "American Labor Union" in 1902 accompanied sporadic and unsuccessful attempts to invade the East.<sup>20</sup> It finally merged with the I. W. W. in 1905.

The Industrial Workers of the World united under one banner a number of dual groups, including the American Labor Union and the Socialist Trade and Labor Alliance. The attitude of its creators may well be summed up in a remark made by one of the most prominent of them:

"It has been said," remarked Haywood, "that this convention was to form an organization rival to the A. F. of L. This is a mistake. We are here for the purpose of forming a *labor organization*."<sup>21</sup>

This hostility is reflected in the many instances of acute conflict between the A. F. of L. and the I. W. W.<sup>22</sup>

The I. W. W. was plagued with factional squabbles that resulted in early fission. In 1906-7 President Sherman, removed from office through Eastern influence, withdrew and organized an unsuccessful rival. In 1908 Daniel De Leon led his personal following out to

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<sup>18</sup> Morris Hillquit, *History of Socialism in the United States* (New York, 1910), p. 277.

<sup>19</sup> Selig Perlman and Phillip Taft, *History of Labor in the United States, 1896-1932* (New York, 1935), p. 217.

<sup>20</sup> American Federation of Labor, *Proceedings*, 1905, p. 254.

<sup>21</sup> Paul F. Brissenden, *The I.W.W. A Study of American Syndicalism* (New York, 1919), p. 83.

<sup>22</sup> *Ibid.*, pp. 116-118, 191 ff., 204. In general see Arthur E. Albrecht, *International Seamen's Union of America*, Bulletin of the Bureau of Labor Statistics No. 342 (1923), chap vii; John S. Gambs, *The Decline of the I.W.W.* (New York, 1932), p. 138; Cloice R. Houd, *Industrial Relations in the West Coast Lumber Industry*, Bulletin of the Bureau of Labor Statistics No. 349 (1924), p. 65; Jesse S. Robinson, *The Amalgamated Association of Iron, Steel and Tin Workers* (1920), p. 50; James Rowan, *The I.W.W. in the Lumber Industry* (1919), pamphlet.

set up another Industrial Workers of the World at Detroit. This latter group later assumed the name of the Workers' International Industrial Union, and was dissolved in 1925 after having languished for many years with a membership never exceeding 10,000.<sup>23</sup> The original I. W. W., led by St. John and Haywood, continued to gain both in repute and membership.<sup>24</sup> Its chief appeal was to migratory workers, and it achieved a measure of success in the agricultural, lumber and maritime industries. Its spectacular career, reaching a climax during the World War period, has been related in detail by Brissenden. After the war, retrocession set in, apparently due to failure to capitalize upon temporary success by establishing permanent unions.<sup>25</sup> Although nominally still in existence, the I. W. W. no longer functions as a labor organization.

Following the virtual eclipse of the I. W. W. in the post-war period, there was a hiatus of several years during which no inter-industrial alliance purported to rival the A. F. of L. Forces were at work, however, which led to the formation of another radical competitor, this time under the guidance of the Communist Party.

The attitude of American socialists toward dual unionism has by no means been an unvarying one. Although De Leon had staunchly practiced it, the more moderate branch of the socialist movement has continually advocated "boring from within" the A. F. of L., and succeeded at one time in gaining considerable influence therein.<sup>26</sup> William Z. Foster, one of the ablest of the Communist organizers, was early convinced that dualism was fundamentally incorrect.<sup>27</sup> Under his energetic leadership the left-wing Trade Union Educational League was set up after the war to act as a propaganda agency within the American Federation of Labor. In spite of the League's fervent protestations,<sup>28</sup> it was branded as a dual organiza-

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<sup>23</sup> Leo Wolman, *Ebb and Flow in Trade Unionism* (New York, 1936), pp. 190-191.

<sup>24</sup> The Western Federation of Miners withdrew from the I.W.W. in 1907 and reaffiliated with the A. F. of L. in 1911. See American Federation of Labor, *Proceedings*, 1911, p. 125.

<sup>25</sup> Gambs, *op. cit.* at n. 22, *passim*; Saposs, *op. cit.* at n. 17, pp. 147-148.

<sup>26</sup> Saposs, *op. cit.* at n. 17, chap. ii.

<sup>27</sup> William Z. Foster, *From Bryan to Stalin* (London, 1937), pp. 59 ff.

<sup>28</sup> "Dual unionism is a malignant disease that sickens and devitalizes the whole labor movement."

"Dual unionism is a useless and insupportable squandering of labor's

tion, and many of its partisans were expelled from the Federation.<sup>29</sup>

In 1928 the Red International Labor Union, of which the T. U. E. L. was an affiliate, reversed its previous policy of anti-dualism and ordered the establishment of a rival trade union center. This action was deemed justified because the A. F. of L. was pursuing a non-militant policy, and was expelling large numbers of revolutionaries.<sup>30</sup>

After some preliminary hesitation within the ranks of the Communist Party,<sup>31</sup> three independent unions were set up: the National Miners Union, the National Textile Workers Union and the Needle Trades Workers Industrial Union, with a combined membership of 57,000. The parent organization was rechristened the Trade Union Unity League (T. U. U. L.). A great many additional national and regional unions were chartered,<sup>32</sup> but except in the fur indus-

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most precious life force. It is a bottomless pit into which the workers have vainly thrown their energy and idealism."

"Dual unionism condemned to sterility every branch of the entire labor movement, industrial, political and otherwise . . . . The persistence, for a generation, of the fatal dual union policy is the true explanation of the paradoxical and deplorable situation of the United States, the most advanced country in the world, having the most backward labor movement." William Z. Foster, *Bankruptcy of the American Labor Movement* (Trade Union Educational League, 1923), pamphlet.

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<sup>29</sup> Perlman and Taft, *op. cit.* at n. 19, chap. 40; Lorwin, *op. cit.* at n. 7, pp. 259-263; Saposs, *op. cit.* at n. 17, chap. xii.

<sup>30</sup> Foster, *From Bryan to Stalin*, *op. cit.* at n. 27, p. 209. Substantially similar arguments were advanced by another prominent communist trade union leader, Jack Stachel, in *The Communist*, November, 1934.

<sup>31</sup> "At the time we had much factional division in the C. P. over the question. I was one of those who sharply warned of the danger of abandoning work in the old unions . . . ." Foster, *From Bryan to Stalin*, *op. cit.* at n. 27, p. 215.

<sup>32</sup> These, with the membership claimed for them by the T.U.U.L. (where the figures are available) were: Auto Workers Union (5,000); Building Maintenance Workers Union; Cannery and Agricultural Workers Union; Doll and Toy Workers Union; Food and Packinghouse Industrial Union; Food Workers Industrial Union (1,500); Furniture Workers Industrial Union; Jewelry Workers Industrial Union; Laundry Workers Industrial Union; Lumber Workers Industrial Union (3,000); Marine Transport Workers Industrial Union (2,000); Mine, Oil and Smelter Workers Industrial Union (successor to National Miners' Union); Novelty Leather Workers Union; National Textile Workers Union; Office Workers Union; Photograph Workers Industrial Union; Railroad Workers Industrial League; Shoe and Leather Workers Industrial Union; Steel and Metal Workers Industrial Union (1,400); Tobacco Workers Industrial Union; Wholesale Dry Goods Workers Union. Sources: Foster, *From Bryan to Stalin*, *op. cit.* at n. 27, pp. 229-242; *Handbook of American Trade Unions*, 1936, Bulletin

try<sup>33</sup> little organizational success was attained.<sup>34</sup> However, the T. U. U. L. led a number of strikes,<sup>35</sup> and undoubtedly exercised a greater influence than its size might indicate. In 1935 the League was formally dissolved and the policy of "boring from within" resumed.

Although T. U. U. L. spokesmen piously disclaimed any intention of rivaling the A. F. of L.,<sup>36</sup> serious trouble would probably have arisen had it managed to survive. Indeed, in the fur trade in New York City, the Fur Workers Industrial Union fought the A. F. of L. International Fur Workers Union to a standstill:

Vicious fights on the picket lines, in the shops and on the streets were a daily occurrence. Few weeks passed when workers, slashed with the knives of their trade or trampled by the boots of rival unionists, did not fill the emergency wards and night courts.<sup>37</sup>

The demise of the League marked the end of still another unsuccessful attempt to create a radical bloc of trade unions in the United States.

Before turning to the most recent manifestation of rival unionism in this country, the course of labor organization in several industries that will figure importantly in the later discussion of judicial litigation should be considered. One of the most important of these industries is the mining of coal. In 1885 the National Federation of Miners and Mine Laborers was formed, followed four years later by

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of the Bureau of Labor Statistics, No. 618, pp. 13-16; *Labor Fact Book* (New York, 1934), vol. ii, p. 118; *Labor Fact Book* (New York, 1936), vol. iii, p. 100.

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<sup>33</sup> Jack Hardy, *The Clothing Workers* (New York, 1935), p. 140.

<sup>34</sup> In 1933 the T.U.U.L. claimed only 125,000 members, and even this figure may well be discounted.

<sup>35</sup> Jack Stachel, "Work in Trade Unions," *The Communist*, March 1934.

<sup>36</sup> "Our basic trade-union policy remains the same . . . . It has nothing in common with traditional dual unionism! We participate actively in all mass trade unions and seek to revolutionize them. The question at issue is one of emphasis. The objective situation demands that we put much more emphasis on the establishment of new unions. Our flexible policy of building new unions and working within the old ones where they have a mass character is quite a different theory from the inflexible sectarian dualism of the I.W.W." William Z. Foster, "Old Unions and New Unions," *The Communist*, July, 1928. See also Jack Stachel, "Our Trade Union Policy," *The Communist*, November, 1934.

<sup>37</sup> David Scheyer, "Peace Comes to the Fur Market," *The Nation*, August 14, 1935. An excellent account of this struggle is contained in an affidavit filed by Ben Gold in the case of Nuremberg v. Associated Fur Coat and Trimming Manufacturers, New York County Clerk Index No. 20051 (1933).

## HISTORY

the National Progressive Union of Miners and Mine Laborers. District 135 of the Knights of Labor also admitted miners. After disastrous internecine warfare, the unions were amalgamated into the United Mine Workers of America, which was at first affiliated with both the American Federation of Labor and the Knights of Labor, but soon dissolved its tie with the latter.<sup>38</sup> After initial setbacks, the U. M. W. A. grew steadily in size and power. One of the first challenges to its expansion came in 1919 in the form of a rank and file revolt against the leadership in Illinois and in Canada, the latter under the guidance of the One Big Union.<sup>39</sup> Wholesale expulsions and charter revocations suppressed this outburst, yet unrest continued.<sup>40</sup> In 1928 a "Reorganized United Mine Workers" was set up in District No. 12, but a compromise averted the continuance of this potential source of factional strife.

In 1928 the Trade Union Unity League established the National Miners Union. This group led a number of strikes in Pennsylvania, Ohio and West Virginia, but never secured a mass following.<sup>41</sup> Several years later Frank Keeney, with the help of the Conference for Progressive Labor Action, founded the short lived West Virginia Mine Workers Union. The United Anthracite Miners of Pennsylvania, which disbanded within two years of its inception in 1933, was also unable to make any headway against the combined opposition of the U. M. W. A. and the operators.<sup>42</sup>

The only permanent rival to the United Mine Workers was the Progressive Miners of America, established in 1932 as a result of dissatisfaction with the collective agreement negotiated by President Lewis for the Illinois fields.<sup>43</sup> It managed to survive one of the

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<sup>38</sup> Ware, *op. cit.* at n. 2, pp. 213-218.

<sup>39</sup> Sylvia Kopald, *Rebellion in Labor Unions* (New York, 1924), p. 100; Marion Savage, *Industrial Unionism in America* (New York, 1933), p. 197.

<sup>40</sup> Perlman and Taft, *op. cit.* at n. 19, chap. 36.

<sup>41</sup> Foster, *op. cit.* at n. 27, p. 229; Anna Rochester, *Labor and Coal* (New York, 1931), pp. 223 ff.

<sup>42</sup> "Anthracite Peace," *The Nation*, Nov. 13, 1935; *The Workers Age*, Jan. 15, 1934, Dec. 1, 1934; *Mische v. Kaminski* (Pa.), 193 Atl. 410 (1937).

<sup>43</sup> "Revolt of the Illinois Miners," *Labor Age*, September, 1932.

bloodiest fratricidal wars in the history of trade unionism,<sup>44</sup> and after absorbing the West Virginia Mine Workers Union<sup>45</sup> in 1934 claimed 32,000 members. Casting aside its previous left wing leadership a year later,<sup>46</sup> Progressive maintained a bellicose independence, returning the fire of the United Mine Workers in kind.<sup>47</sup> Finally, in 1938, after the U. M. W. A. had shifted to the C. I. O., Progressive received an international charter from the American Federation of Labor, paralleling the jurisdiction of the United.<sup>48</sup>

In the manufacture of shoes, small unions, confined to one or two towns, have been common. The regular A. F. of L. group, the Boot and Shoe Workers Union, was formed by a merger in 1895.<sup>49</sup> A little over a decade later a secession resulted in the founding of the United Shoe Workers of America, which was joined in 1912 by Cutters Assembly No. 3662, Knights of Labor, and several other locals. The Shoe Workers Protective Union and the Allied Shoe Workers Union, also independents, were operating in Massachusetts at the time. Allied and a number of smaller groups set up the Amalgamated Shoe Workers of America in 1922,<sup>50</sup> while United and Protective combined two years later. Shortly thereafter the

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<sup>44</sup> Address of Mr. Joseph Ozanic, American Federation of Labor, *Proceedings*, 1938, p. 217; *Report of the Illinois Legislative Committee on the P.M.A.—U.M.W.A. controversy*, *United Mine Workers Journal*, vol. 44, No. 14; *United Electric Coal Co. v. Rice*, 80 Fed. (2d) 1 (1935); *People v. Beacham*, 358 Ill. 373 (1934).

<sup>45</sup> Tom Tippet, "A New Miners Union in Illinois," *Labor Age*, October, 1932.

<sup>46</sup> As a matter of fact, it seems to have gone far in the other direction. "Its publication, *The Progressive Miner*, held an unmatched record for red-baiting and anti-Semitism." Edward Levinson, *Labor on the March* (New York, 1938), p. 228.

<sup>47</sup> For allegations that P.M.A. had hired a man to assassinate John L. Lewis, see the *New York Times*, Nov. 23, 1937. Thirty-six Progressive members were convicted of bombing railroads and mines (*New York Times*, Dec. 19, 1937) and after several years of litigation, 34 of them were sentenced to two years in prison and fines of \$10,000 each. (*New York Times*, May 11, 1939). On the other hand, the president of P.M.A. claims that a great many of his constituents were murdered at the instigation of the U.M.W.A., and that his organizers were frequently beaten and driven away. American Federation of Labor, *Proceedings*, 1937, pp. 524-534.

<sup>48</sup> American Federation of Labor, *Proceedings*, 1938, pp. 77, 102.

<sup>49</sup> Augusta E. Galster, *The Labor Movement in the Shoe Industry* (New York, 1924), *passim*.

<sup>50</sup> "This group has been gradually absorbed by the Shoe Workers Protective Union." Bulletin of the Bureau of Labor Statistics No. 618 (1936).

American Shoe Workers Union, with its membership confined to New York City, came into existence.<sup>51</sup> In 1933, Boot and Shoe Workers' locals in Brockton, Mass., broke away to unite in the Brotherhood of Shoe and Allied Craftsmen,<sup>52</sup> while a new National Shoe Workers Association and the Shoe and Leather Workers Union (T. U. U. L.) further complicated the situation.<sup>53</sup> The same year saw the amalgamation of the Shoe Workers Protective Union, the National Shoe Workers Association, the Shoe and Leather Workers Industrial Union, the Independent Shoe Workers Union of Salem and the Brotherhood of Shoe Workers of Greater New York into the United Shoe and Leather Workers Union,<sup>54</sup> which was subsequently chartered as the United Shoe Workers of America by the C. I. O.<sup>55</sup>

The railroads have had their share of dual and rival unions. Although the strong brotherhoods are outside the A. F. of L.,<sup>56</sup> the respect generally accorded their jurisdictional claims by the Federation has prevented serious conflict.<sup>57</sup> Opposition to them has arisen chiefly from attempts to form industrial unions cutting across their strict craft demarcations. An early example is the American Railway Union, founded by Eugene V. Debs in 1893, and practically destroyed by the famous Pullman strike.<sup>58</sup> The American Federation of Railroad Workers began an independent career in 1911 after withdrawing from the American Federation of Labor, from which it

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<sup>51</sup> Bulletin of the Bureau of Labor Statistics No. 506 (1929).

<sup>52</sup> This organization remains independent at the present time, although it has been offered affiliation with the United Shoe Workers of America, C.I.O. *Union News Service*, Nov. 15, 1937.

<sup>53</sup> *The Workers Age*, March 14, 1933; December 1, 1933.

<sup>54</sup> *Ibid.*, January 1, 1934.

<sup>55</sup> *C.I.O. News*, May 14, 1938.

<sup>56</sup> The so-called "Big Four" independents are: The Order of Railway Conductors of America, the Grand International Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railway Trainmen. Within the A. F. of L., however, are the important Brotherhood of Railway and Steamship Clerks, the Brotherhood of Maintenance of Way Employees and the Switchmen's Union of North America.

<sup>57</sup> For exceptions to this statement, see Saposs, *op. cit.* at n. 17, p. 85, footnote 1.

<sup>58</sup> Ohio D. Boyle, *History of Railroad Strikes* (Washington, 1935), p. 45.

had a charter as the International Association of Car Workers.<sup>59</sup> In 1920, latent post-war discontent, brought to a head by the discharge of an active yard conductor in the employ of the Chicago, Milwaukee & St. Paul R. R., resulted in the formation of several rivals to the brotherhoods. These were liquidated, however, after having conducted an outlaw strike against the combined forces of the brotherhoods, the carriers and the Railroad Labor Board.<sup>60</sup> Some die-hards persisted in their revolt through a newly-organized United Association of Railway Employees of North America, but to no avail. A crop of small negro unions<sup>61</sup> has grown as a result of the racial policy of the brotherhoods, but they are not dangerous competitors.

The men's clothing division of the garment trades has been dominated since 1914 by two unions, the United Garment Workers, affiliated with the American Federation of Labor, and the Amalgamated Clothing Workers of America. The latter made its independent debut as a secession movement from the U. G. W., taking with it a large portion of the latter's membership.<sup>62</sup> Although it did not come into the A. F. of L. until 1933, there was little actual rivalry, since the United Garment Workers confined itself, on the whole, to the manufacture of overalls and similar garments in the sale of which the union label was important, a territory which the Amalgamated did not dispute. Amalgamated was expelled from the Federation in 1938 and became a member of the Congress of Industrial Organizations, a step which has already stimulated large-scale friction in this industry.

In the manufacture of women's clothing the International Ladies' Garment Workers Union has maintained undisputed sway, except

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<sup>59</sup> Bulletin of the Bureau of Labor Statistics No. 618 (1936), p. 266; Savage, *op. cit.* at n. 39, p. 277.

<sup>60</sup> Boyle, *op. cit.* at n. 58, pp. 70-101; Perlman and Taft, *op. cit.* at n. 19, p. 453; Kopald, *op. cit.* at n. 39, *passim*; Walter E. McCaleb, *The Brotherhood of Railway Trainmen* (New York, 1936), p. 96.

<sup>61</sup> Among them are the National Association of Brakemen-Porters, the Brotherhood of Dining Car Employees, the Association of Train Porters, Brakemen and Switchmen, the Association of Colored Railway Trainmen and Locomotive Firemen, the Progressive Order of Colored Locomotive Firemen, the National Federation of Railway Workers, the Afro-American Federation of Railway Employees.

<sup>62</sup> *Documentary History of the Amalgamated Clothing Workers of America, 1914-1916*, p. 44; George Soule, *Sidney Hillman* (New York, 1939), chap v.

for sporadic attempts at rivalry made by I. W. W. and T. U. U. L. affiliates. But the fur workers have until recently been divided along ideological lines. Internal strife continually disrupted the International Fur Workers Union from its inception in 1913 to the expulsion of several communist locals in 1927. These internal hostilities, however, were merely transferred to the external sphere with the organization of the successful Fur Workers Industrial Union (T. U. U. L.).<sup>63</sup> Upon the dissolution of the T. U. U. L., the radical element rejoined and secured control of the International, which subsequently received a charter from the C. I. O.

Labor in the textile industry has been organized into innumerable small groups, characterized by rapid turnover of membership and frequent combinations and separations. The United Textile Workers of America, although possessing an A. F. of L. charter, never attracted many workers for any length of time. The Associated Silk Workers,<sup>64</sup> the American Federation of Textile Operatives,<sup>65</sup> the Amalgamated Lace Operatives of America,<sup>66</sup> the Federated Textile Unions of America<sup>67</sup> and a host of lesser lights arose at various times to challenge its jurisdiction. After undergoing a rapid growth and decline during the N. R. A. period, the U. T. W. mortgaged itself to the Textile Workers Organizing Committee of the C. I. O. Still more recently, several of the U. T. W. locals have disassociated themselves from the T. W. O. C. and regained their

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<sup>63</sup> Perlman and Taft, *op. cit.* at n. 19, pp. 543-546.

<sup>64</sup> This union, originally an industrial department of the I.W.W., joined the United Textile Workers in 1916 but seceded in 1919. In 1931, however, it reaffiliated with the United. Bulletin of the Bureau of Labor Statistics No. 618 (1936) p. 228.

<sup>65</sup> Organized in 1916, its membership was concentrated chiefly in Fall River and New Bedford, Mass. *Ibid.*, p. 226.

<sup>66</sup> This was formed in 1892, an A. F. of L. affiliate, but was expelled in 1919 for refusing to merge with the United Textile Workers. *Ibid.*, p. 225.

<sup>67</sup> In 1921 this union was formed by merger of the following independents: American Federation of Textile Operatives, Amalgamated Textile Workers, Amalgamated Brussels Carpet Association, Associated Silk Workers of Patterson, New York Amalgamated Knit Goods Workers, National Loom Fixers. The Amalgamated Textile Workers and Associated Silk Workers withdrew in 1923. Full details may be found in Gladys Louise Palmer, *Labor Relations in the Lace and Lace-Curtain Industries in the United States*, Bulletin of the Bureau of Labor Statistics No. 399 (1925); Saposs, *op. cit.* at n. 17, pp. 99, 154.

old A. F. of L. charter,<sup>68</sup> while the loyal locals consolidated with the T. W. O. C. in the new Textile Workers Union of America.<sup>69</sup>

In automobiles, no really effective organization existed until the A. F. of L. sponsored the United Automobile Workers of America in 1935, although there had been no lack of diminutive local bodies. The U. A. W. A. was one of the original constituents of the C. I. O., but in 1939 a portion of the membership, led by President Homer Martin, withdrew and accepted the offer of a new A. F. of L. charter.<sup>70</sup> Among the sailors, the International Seamen's Union (A. F. of L.) predominated for many years, but was unable to achieve anything more than fragmentary organization. Despite abortive efforts at revival made in 1934-6, the East Coast seamen flocked to a new rival, the National Maritime Union.<sup>71</sup> On the West Coast the Sailors' Union of the Pacific, theretofore a district of the I. S. U., withdrew in 1935, but superseded its old parent in 1938 when it became the nucleus of the Seafarer's Union, the A. F. of L.'s answer to the challenge of the National Maritime Union.<sup>72</sup> Licensed marine officers were variously represented by the National Organization of Masters, Mates and Pilots of America (A. F. of L.), the Ocean Association of Marine Engineers, the Neptune Association (the latter two merged in 1933 to form the United Licensed Officers) and the National Marine Engineers' Beneficial Association (C. I. O.).<sup>73</sup> The A. F. of L. union complained that Joseph P. Ryan, head of the International Longshoremen's Association, fostered dualism by chartering the Associated Marine Workers,<sup>74</sup> Harbor Boatmen Local No. 333,<sup>75</sup> Railroad Marine

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<sup>68</sup> *New York Times*, Jan. 23, 1939, Feb. 4, 1939; *Labor Relations Reporter*, Feb. 13, 1939.

<sup>69</sup> Congress of Industrial Organizations, *Daily Proceedings of the 1939 Convention*, p. 33.

<sup>70</sup> American Federation of Labor, *Daily Proceedings*, 1939, p. 23.

<sup>71</sup> *New York Times*, May 6, May 28, May 30, May 31, June 1, July 18, July 21, 1937; *The New Republic*, Feb. 2, 1938, p. 361. See also Phillip Taft, "Strife in the Maritime Industry," *Political Science Quarterly*, June, 1939, p. 216.

<sup>72</sup> American Federation of Labor, *Daily Proceedings*, 1939, p. 23.

<sup>73</sup> Bulletin of the Bureau of Labor Statistics No. 618, pp. 233-234.

<sup>74</sup> "Mr. Ryan issued a charter to Captain Maher although he knew him of old both as dual to our group and a person of doubtful integrity. Mr. Maher used Mr. Ryan's influence and money to increase his flimsy organiza-

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Workers 933-5 and the United Licensed Officers.<sup>76</sup> Mr. Todd of the U. L. O. provided an accurate characterization of this situation when he said that the "men on the waterfront will sign anything to get away from organizers and to insure the safety of their jobs. They may have been paying dues to one union for years, but if told by a man who professes to have authority that they must sign cards authorizing another union to act for them, they will sign without question."<sup>77</sup>

A relatively unimportant but extensively litigated series of rival union disputes occurred among the New York motion picture machine operators. The largest organization is Local 306, Motion Picture Machine Operators Union, affiliated with the International Alliance of Theatrical and Stage Employees. The smaller Empire State Motion Picture Machine Operators Union, Inc., appears originally to have received the stimulus of employer encouragement,<sup>78</sup> and the same hypothesis may be advanced to explain the origin of the Allied Motion Picture Machine Operators Union, which merged with Local 306 in 1937.<sup>79</sup> The United Projectionists Union, about which little information is available, functioned for a

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tion and then deserted to C. I. O. and left Mr. Ryan on the beach." American Federation of Labor, *Proceedings*, 1938, p. 444.

<sup>75</sup> An amusing sidelight was the rivalry between this organization and the Associated Marine Workers. See *New York Times*, Oct. 16, 1937. Eventually the two merged but the respective leaders, Captain William Bradley and Captain William Maher could not get along together, so the latter led his long-suffering constituents into the C. I. O. *New York Times* Dec. 25, 1938.

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<sup>76</sup> "This group has disintegrated and at a very recent date Mr. Ryan revoked its charter but not until the cash register refused to jingle with dues. The revocation of this charter was no compliment to us, the Executive Council or President Green, who had ordered the charter withdrawn." American Federation of Labor, *Proceedings*, 1938, p. 444. The controversy still rages. See American Federation of Labor, *Daily Proceedings*, 1939, pp. 648-665.

<sup>77</sup> *New York Times*, August 9, 1937.

<sup>78</sup> Chanan Kuselewitz, "Dual Unionism in New York City," (Unpublished manuscript in the library of Columbia University, 1934).

<sup>79</sup> See: the findings of Referee Marsh in *Glover v. Basson*, 157 Misc. 819, 285 N. Y. S. 909 (1935); the brief of Matthew Levy in *De Agostina v. Leff Theatres Corp.*, Bronx County Clerk Index No. 8236 (1935); *Esco Operating Corp. v. Empire State Motion Picture Machine Operators Union*, N. Y. L. J., Oct. 7, 1933, p. 1207.

brief period beginning in 1922, while the Brotherhood of Motion Picture Projectionists enjoyed a similar career a decade later.

The background of the contemporary division in the American labor movement has been widely discussed both in the public press and by students of industrial relations.<sup>80</sup> There is general agreement that the official American Federation of Labor policy of craft exclusiveness was the chief element in producing the breach. This philosophy of the dominant crafts was clearly formulated at a very early date. At the 1894 convention it was resolved that:

The essential ground work of the trade union movement is the complete control of the affairs of the trade by the members of that trade. Any violation of this principle is . . . manifestly in antagonism to the recorded policy of the Federation of Labor . . . theoretically unsound and practically unwise.<sup>81</sup>

Nine years later President Gompers solemnly proclaimed that: "The attempt to force the trade unions into what has been termed industrial organization is perverse of the history of the labor movement, runs counter to the best conceptions of the toilers' interests now, and is sure to lead to the confusion which precedes dissolution and disruption."<sup>82</sup>

Within the Federation the industrial and quasi-industrial national unions,<sup>83</sup> as well as the Socialists, ceaselessly endeavored to modify the resultant inflexibility, with little success.<sup>84</sup> However, the growing pressure in 1933 and 1934, induced by a flood of workers into nascent industrial organizations, forced concessions from the crafts.

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<sup>80</sup> Some of the more competent studies are contained in the following volumes: R. R. R. Brooks, *When Labor Organizes* (New Haven, 1937); Herbert Harris, *American Labor* (New Haven, 1939); Edward Levinson, *op. cit.* at n. 46; Lois McDonald, *Labor Problems and the American Scene* (New York, 1938); Mary Heaton Vorse, *Labor's New Millions* (New York, 1939); J. Raymond Walsh, *The C. I. O.* (New York, 1937); Leo Wolman, *Ebb and Flow in Trade Unionism* (New York, 1937).

<sup>81</sup> American Federation of Labor, *Proceedings*, 1894, p. 57.

<sup>82</sup> American Federation of Labor, *Proceedings*, 1903, p. 18.

<sup>83</sup> The International Ladies Garment Workers' Union and the United Mine Workers are usually regarded as the chief examples in this category.

<sup>84</sup> See, for example, American Federation of Labor, *Proceedings*, 1903, p. 61; *Ibid.*, 1905, p. 180; *Ibid.*, 1906, p. 148; *Ibid.*, 1921, p. 265; *Ibid.*, 1913, p. 377; *Ibid.*, 1914, p. 374; *Ibid.*, 1915, p. 296; *Ibid.*, 1919, p. 348. At the 1912 convention the United Mine Workers, with the support of the Socialists, introduced a resolution calling for the endorsement of industrial organization. It was defeated by a vote of 10,934 to 5,929, or 65 percent to 35 percent. It will be recalled that the crucial 1935 convention defeated a similar motion by 18,024 to 10,933, or 63 percent to 37 percent.

The Executive Council was authorized to issue charters to national unions in the automotive, cement, aluminum and other mass production industries with the understanding "that the rights of the craft unions . . . be fully protected in all of the plants, particularly outside of the generally recognized mass production plants . . . ." <sup>85</sup>

The Committee on Resolutions of the 1935 convention was presented with twenty-one resolutions dealing with this question, nine calling for the issuance of industrial charters in specific industries and twelve for the replacement of existing craft unions by industrial organizations. The majority of the Committee opposed their adoption, but a minority report came out strongly in their favor.<sup>86</sup> The debate on a motion to adopt the minority view marked the climax of the long struggle. John L. Lewis, at his rhetorical best, charged the Executive Council with bad faith in restricting the jurisdictions of the automobile and rubber unions created pursuant to the resolution of the 1934 convention. He was supported from the floor by Howard, Murray and McMahon, who alternately pleaded, cajoled and threatened. John P. Frey, for the majority, maintained that the jurisdictions of the constituent national unions were in the nature of contractual rights not subject to unilateral abrogation, while Victor Olander termed the minority proposals unconstitutional. Put to a vote, the resolution of the minority was defeated and that of the majority accepted.

Personal animosities, although arising to a large extent out of the issue of industrial organization, were themselves an important factor in the creation and perpetuation of the schism. Matthew Woll was smarting from his forced resignation as president of the National Civic Federation, while the memory of John Lewis' fist was not a

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<sup>85</sup> American Federation of Labor, *Proceedings*, 1934, pp. 582-594. The qualification was not part of the resolution, but was added in rather truculent fashion by Delegate Franklin of the Boilermakers' Union.

<sup>86</sup> "To successfully organize the workers in industrial establishments where conditions outlined herein obtain there must be a clear declaration by the American Federation of Labor. It must recognize the right of these workers to organize into industrial unions and be granted unrestricted charters which guarantee the right to accept into membership all workers employed in the industry or establishment without fear of being compelled to destroy unity of action through recognition of jurisdictional claims made by National or International Unions." American Federation of Labor, *Proceedings*, 1935, p. 524.

sweet one to William Hutcheson. Tempers were frayed by incessant argument in the Council and in committees, and on the whole the leaders of the C. I. O. were politically to the left of the A. F. of L. stalwarts.

The Committee for Industrial Organization, as originally planned, was in no sense a rival to the Federation, since the unions represented on it had all been affiliated with the latter.<sup>87</sup> Early in 1936 (the Committee had been organized rather informally after the 1935 A. F. of L. convention) the Executive Council of the Federation appointed a committee to confer with the C. I. O. leaders concerning dissolution, an act that proved ineffective.<sup>88</sup> A similar outcome followed upon the Council's invitation to the C. I. O. members to appear before it and explain the reasons for the rejection of the previous offer. On August 5, 1936, the A. F. of L. decreed that:

The Committee for Industrial Organization is a dual organization functioning within the American Federation of Labor as such and in its administrative activities it is clearly competing as a rival organization with the American Federation of Labor . . . the Executive Council orders and directs that each union affiliated with the so-called Committee for Industrial Organization withdraw from and sever relations with said Committee . . . . Any union now affiliated with the Committee for Industrial Organization, not announcing its withdrawal therefrom on or before September 5, 1936, shall thereupon by this order stand suspended from the American Federation of Labor.<sup>89</sup>

On the appointed day ten national unions<sup>90</sup> were suspended from the American Federation of Labor.<sup>91</sup> By a vote of 21,679 to 2,043

<sup>87</sup> "It is *not* the intent, aim or purpose to take any action that will invite or promote organization that in any way can be considered dual to the American Federation of Labor. Quite the contrary is true. We seek to alter a policy which now invites such dual organization." Letter from Secretary Charles P. Howard to Pres. Wm. Green, quoted in American Federation of Labor, *Proceedings*, 1936, p. 73.

<sup>88</sup> *Ibid.*, p. 76.

<sup>89</sup> *Ibid.*, pp. 81-82.

<sup>90</sup> Amalgamated Clothing Workers; Amalgamated Association of Iron, Steel and Tin Workers; Federation of Flat Glass Workers; International Ladies' Garment Workers; International Union of Mine, Mill and Smelter Workers; United Automobile Workers; Oil Field, Gas Well and Refinery Workers; United Mine Workers; United Rubber Workers; United Textile Workers. Although the chief executives of the United Hatters, Cap and Millinery Workers and the International Typographical Union participated in the formation of the C. I. O., the unions themselves were not deemed to have sanctioned the participation, and were therefore exempted from the order of suspension.

<sup>91</sup> The constitutionality of the suspension is discussed in 5 *International Juridical Association Bulletin*, No. 2, p. 15 (1938).

the 1936 convention ratified the decision of the Executive Council,<sup>92</sup> a foregone conclusion in view of the fact that the suspended unions were not permitted to vote. Only the Millinery and Typographical Unions were opposed. Subsequent events fully justified the warning that suspension would "not cure the dualism. The breach in the next few years will be widened and not healed, and when it is widened you will have fraternal strife, the end of which no man can see."<sup>93</sup> The net effect was to launch the C. I. O. upon the career of intensive organization and expansion that transformed it into easily the most formidable rival ever encountered by the Federation.

For the convenience of the interested reader, there follows a brief check list of competing A. F. of L. and C. I. O. unions. The reader is warned, however, that there are many cross currents of jurisdictional controversy, so that the matching of rivals merely contemplates a selection of those unions which are combatants by virtue of overlapping claims contained in formal charters.<sup>94</sup> The new C. I. O. unions are given first, followed by their A. F. of L. rivals:

1. United Electrical, Radio and Machine Workers Union. Affiliated, November, 1936. Membership, 150,000—200,000. Succeeded several American Federation of Labor federal locals. Rivals the International Brotherhood of Electrical Workers, 200,300, and the International Association of Machinists, 190,000.<sup>95</sup>

2. International Union of Marine and Shipbuilding Workers of America. Affiliated, November, 1936. Membership, 10,000—20,000. Formerly an independent union organized in 1934.<sup>96</sup> Rival to metal trades unions.

3. United Shoe Workers of America. Affiliated, April, 1937. Membership, 50,000—75,000. Rivals the Boot and Shoe Workers International Union, 30,800.<sup>97</sup>

4. American Communications Association. Affiliated, April, 1937. Membership, 10,000—25,000. Successor to the independent American Radio

<sup>92</sup> American Federation of Labor, *Proceedings*, 1936, p. 552.

<sup>93</sup> Speech of Delegate Friedrich, *Ibid.*, p. 545.

<sup>94</sup> Membership figures for the C. I. O. have been taken from the proceedings of the 1939 Convention, and the A. F. of L. figures are derived from a similar source. Other information was secured from Walsh, *op. cit.* at n. 80, the C. I. O. *Union News Service*, its successor, the C. I. O. *News*, and by direct correspondence with the unions themselves. The following footnotes refer, in the main, to actual instances of overt conflict.

<sup>95</sup> *New York Times*, Feb. 21, 1937, April 10, 1937, April 21, 1937, May 13, 1937, June 6, 1937, June 8, 1937, June 11, 1937, June 16, 1937, Sept. 28, 1937, Nov. 14, 1937. *New York World-Telegram*, June 8, 1937. *Union News Service*, Feb. 17, 1936, March 30, 1936, Nov. 9, 1936.

<sup>96</sup> Bulletin of the Bureau of Labor Statistics, No. 618 (1936), p. 194.

<sup>97</sup> *Supra*, p. 13. *Union News Service*, March 8, 1937.

Telegraphers Association. Rivals the Commercial Telegraphers Union, 3,500, and impinges upon the jurisdiction of the International Brotherhood of Electrical Workers.<sup>98</sup>

5. Aluminum Workers of America. Affiliated, April, 1937. Membership, 25,000—50,000. Rivals Aluminum Workers Council.<sup>99</sup>

6. Transport Workers Union of America. Affiliated, May, 1937. Membership, 75,000—100,000. Successor to locals of the International Association of Machinists. Rivals the Amalgamated Association of Street and Electric Railway Employees, 79,700, and the International Brotherhood of Teamsters.<sup>100</sup>

7. Federation of Architects, Engineers, Chemists and Technicians. Affiliated, May, 1937. Membership, 5,000—10,000. Rivals the International Federation of Technical Engineers, Architects and Draftsmen, 1,900.

8. International Leather and Fur Workers Union. Formed of the National Association of Leather Workers and the International Fur Workers Union in 1939. Membership, 150,000—200,000. Rival to the United Leather Workers Union, 2,500.

9. United Retail and Wholesale Employees of America. Affiliated, May, 1937. Membership, 50,000—75,000. Formerly part of its rival, Retail Clerks International Protective Association, 65,300.<sup>101</sup>

10. United Office and Professional Workers of America. Affiliated, May, 1937. Membership, 25,000—50,000. Succeeded a number of A. F. of L. federal locals. Rivals the Office Employees International Council, consisting of 107 federal locals.

11. American Newspaper Guild. Affiliated, June, 1937. Membership, 10,000—25,000. Seceded from the American Federation of Labor. Rivals several newly created News Writers federal locals.<sup>102</sup>

12. United Federal Workers of America. Affiliated, June, 1937. Membership, 25,000—50,000. Seceded from present rival, the American Federation of Government Employees, 22,600.<sup>103</sup>

13. National Die Casting Workers. Affiliated, September, 1937. Membership, 5,000—10,000. "Our early history was the formation of a Die Casting Workers League, Inc. which was formed from various die maker groups, and in some cases company unions which had been formed on an industrial basis."<sup>104</sup>

14. State, County and Municipal Workers of America. Affiliated, July, 1937. Membership, 50,000—75,000. Rivals the American Federation of State, County and Municipal Employees, 25,700.

15. United Cannery, Agricultural, Packing and Allied Workers. Affiliated, July, 1937. Membership, 100,000—150,000. The A. F. of L. has

<sup>98</sup> *New York Times*, May 30, 1937, May 31, 1937, June 6, 1937, June 25, 1937, Aug. 18, 1937, Dec. 19, 1937. *New York World-Telegram*, Dec. 10, 1937.

<sup>99</sup> American Federation of Labor, *Proceedings*, 1938, p. 295.

<sup>100</sup> *New York Times*, March 15, 1937, May 6, 1937, May 8, 1937, May 17, 1937, May 23, 1937, May 24, 1937, May 26, 1937, May 31, 1937, June 2, 1937, June 8, 1937.

<sup>101</sup> *New York World-Telegram*, June 22, 1938; *New York Times*, Oct. 14, 1939, July 3, 1939.

<sup>102</sup> *New York Times*, April 24, 1937, Sept. 21, 1937, Nov. 11, 1937. Vorse, *op. cit.* at n. 80, p. 187.

<sup>103</sup> Vorse, *op. cit.* at n. 80, p. 188.

<sup>104</sup> Letter to the author from Edward T. Cheyfitz, Secretary-Treasurer, June 6, 1939.

created the rival National Council of Cannery and Agricultural Workers of America.<sup>105</sup>

16. National Maritime Union. Affiliated, July, 1937. Membership, 50,000—75,000. Seceded from the now defunct International Seamen's Union. Rivals the new Seafarers' International Union, 11,000.

17. International Woodworkers of America. Affiliated, July, 1937. Membership, 100,000—150,000. Seceded from and rival to the United Brotherhood of Carpenters, 300,000.<sup>106</sup>

18. National Marine Engineers Beneficial Association. Affiliated, August, 1937. Membership, 5,000—10,000. Rivals both the International Union of Operating Engineers, 70,800, and the National Organization of Masters, Mates and Pilots, 3,000.

19. International Longshoremen's and Warehousemen's Union. Affiliated, August, 1937. Membership, 25,000—50,000. Seceded from the International Longshoremen's Association, 66,300, to which it is dual but not rival, except in some Gulf ports.

20. United Furniture Workers of America. Affiliated, December, 1937. Membership, 25,000—50,000. Seceded from its present rival, International Union of Upholsterers, 11,000.<sup>107</sup>

21. Quarry Workers International Union. Affiliated, December, 1937. Membership, 10,000—25,000. Seceded from the A. F. of L.

22. United Fishermen's Union of the Pacific. Affiliated, 1938. Membership, 5,000—10,000.

23. Inland Boatmen's Union of the Pacific. Affiliated, September, 1937. Membership, under 5,000. Formerly part of the International Seamen's Union.

24. United Packinghouse Workers of America. Affiliated, February, 1939. Membership, 75,000—100,000. Formerly the Packinghouse Workers Organizing Committee. Rivals the Amalgamated Meat Cutters and Butcher Workmen of America, 62,900.

25. Textile Workers Union of America. Affiliated, May, 1939. Membership, over 200,000. Formerly Textile Workers Organizing Committee. Rivals the United Textile Workers.<sup>108</sup>

26. Playthings and Novelty Workers Union. Formerly an organizing committee. Membership, 5,000—10,000.

In addition to these national organizations, the C. I. O. has set up the following organizing committees, which are in effect young national unions:

Barbers Organizing Committee.

Construction Workers Organizing Committee.<sup>109</sup>

Distillery Workers Organizing Committee.

Farm Equipment Workers Organizing Committee.

<sup>105</sup> American Federation of Labor, *Proceedings*, 1938, p. 84; Vorse, *op. cit.* at n. 80, chap. xix; *New York Times*, July 15, 1939.

<sup>106</sup> *New York Times*, Sept. 5, 1937, Nov. 7, 1937, Nov. 26, 1938; American Federation of Labor, *Proceedings*, 1938, p. 84; Hearings of the Senate Committee on Education and Labor, *To Amend the National Labor Relations Act*, 76th Congress, First Session, 1939, pp. 47, 50, 194, 876ff., 934-961, 1221, 1480, 1528, 2856, 3432ff.

<sup>107</sup> *New York Times*, Dec. 10, 1937.

<sup>108</sup> *New York Times*, Feb. 4, 1939, May 16, 1939, May 20, 1939.

<sup>109</sup> *New York Times*, July 26, 1939.

Optical Workers Organizing Committee.  
 Steel Workers Organizing Committee.<sup>110</sup>  
 Utility Workers Organizing Committee.

The American Federation of Labor has increased the likelihood of jurisdictional strife by chartering the following rivals to original C. I. O. unions:

1. Progressive Mine Workers of America. Chartered in 1938. Membership, 35,000. Rivals the United Mine Workers of America.
2. Tri-State Metal, Mine and Smelter Workers. Chartered in 1937. Membership, 6,000. This union was formerly the notorious "Blue Card" Metal Workers.<sup>111</sup> Rivals the International Union of Mine, Mill and Smelter Workers.
3. Automobile Workers Union. Membership, 4,200. Chartered in 1939. Rivals the United Automobile Workers Union, of which it was formerly a part.<sup>112</sup>

In addition, the Federation has resorted to the practice of forming local councils similar to the C. I. O. organizing committees. Councils of Office Employees, Cement Workers, Beet Sugar Workers, Aluminum Workers, Fabricated Metal Workers and Distillery Workers are clearly dual to existing C. I. O. organizations.<sup>113</sup>

There were periodic attempts to compromise the differences. In November, 1936, Secretary Howard of the C. I. O. proposed a conference between William Green and John L. Lewis, a suggestion to which Green assented with the reservation that he lacked authority to "change the policy outlined by the Executive Committee."<sup>114</sup> Lewis felt that a meeting under these circumstances would be futile, and added: ". . . when the American Federation of Labor decides to reverse and rectify its outrageous act of suspension and is ready to concede the right of complete industrial organizations to

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<sup>110</sup> Although the Amalgamated Association of Iron, Steel and Tin Workers is nominally the national affiliate in this field, the S. W. O. C. is the real unit, and the two will probably be merged in the near future.

<sup>111</sup> "This union is formed of strikebreakers and 'loyal' workers who broke a strike conducted by the Mine, Mill and Smelter Workers International Union while it was still an A. F. of L. affiliate." Brooks, *op. cit.* at n. 80, p. 180. See also Walsh, *op. cit.* at n. 80, p. 212; American Federation of Labor, *Proceedings*, 1937, pp. 112-113.

<sup>112</sup> *New York Times*, April 18, 1939, July 6, 1939.

<sup>113</sup> *Report of the Executive Council of the American Federation of Labor to the 59th Annual Convention*, (1939), pp. 26-29.

<sup>114</sup> American Federation of Labor, *Proceedings*, 1937, p. 99.

## HISTORY

live and grow in the unorganized industries it will be time to discuss and arrange the details of a reestablished relationship."<sup>115</sup>

At its February 1937 session the Executive Council of the Federation ordered the expulsion of C. I. O. unions from city central bodies and state federations of labor, and in May, at a special conference of national and international affiliates, a one cent per member per month levy was voted, to be paid directly to the Federation for the purpose of financing an aggressive campaign against the C. I. O.<sup>116</sup> The 1937 convention of the A. F. of L. empowered the Executive Council to revoke the charters of the suspended unions.<sup>117</sup>

Negotiations were resumed in October 1937, when the C. I. O. proposed that a committee of one hundred from each organization confer upon possible peace terms. The Federation replied that the cumbersome size of the committee would preclude effective dealings,<sup>118</sup> whereupon the C. I. O. delegated ten conferees. Vice-Presidents Harrison, Woll and Bugniazet of the A. F. of L. were selected to meet with them. Convening in Washington, the conference, according to the A. F. of L. representatives, arrived at a tentative agreement embodying the following points:

1. The twelve original A. F. of L. unions were not to be readmitted into the A. F. of L. until all matters affecting the new C. I. O. unions were adjusted.
2. A joint conference was to be established for each of the new C. I. O. unions to work out an acceptable understanding.
3. When these conflicts were adjusted, the entire membership of the C. I. O. would be admitted into the A. F. of L.
4. If all other matters were adjusted, the A. F. of L. committee would consider recommending that the constitution of the American Federation of Labor be amended to make it impossible for the Executive Council to revoke or suspend a national charter without the direct authority of the Convention.
5. A special convention of the A. F. of L. would be held at a reasonable time after all differences had been adjusted, with the C. I. O. unions entitled to full representation therein.
6. The A. F. of L. committee would agree to specify certain industries where industrial organization would apply.<sup>119</sup>

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<sup>115</sup> *Ibid.*, p. 100.

<sup>116</sup> *Ibid.*, p. 106.

<sup>117</sup> *Ibid.*, p. 416.

<sup>118</sup> American Federation of Labor, *Proceedings*, 1938, pp. 86 ff.

<sup>119</sup> Matthew Woll later maintained that the A. F. of L. had been willing to recognize the principle of industrial organization in almost every industry represented by then existent C. I. O. unions. See the *New York Times*, May 26, 1939.

The American Federation of Labor negotiators charged that acceptance of this agreement by the C. I. O. committee was vetoed by John L. Lewis, an assertion which was supported by President Dubinsky of the I. L. G. W. U., one of the representatives of the C. I. O.<sup>120</sup> This was denied both by the C. I. O.<sup>121</sup> and by President Tobin of the Teamsters Union, a member of the A. F. of L. Executive Council, who alleged that not only had no final agreement been reached, but that the A. F. of L. representatives had no power to ratify any contract without reporting back to the Council.<sup>122</sup> Mr. Lewis insisted that all the C. I. O. unions first be admitted to full standing in the Federation with a guarantee of the right to organize along industrial lines, after which the jurisdictional questions would be ironed out. The A. F. of L. retorted that this "would hereafter have subjected every organization in the American Federation of Labor to constant attack from within, as well as without, the fold."<sup>123</sup> On this note of discord the conference ended without material achievement. As an aftermath, the Executive Council, on Feb. 4, 1938, revoked the charters of the United Mine Workers, the Mine, Mill and Smelter Workers, and the Federation of Flat Glass Workers, extending this list three months later to include the Automobile Workers, the Iron, Steel and Tin Workers, the Amalgamated Clothing Workers, the United Textile Workers and the Oil Field Workers.<sup>124</sup> This in turn led to the formation of a permanent Congress of Industrial Organizations to replace the haphazard and constitutionless Committee for Industrial Organization.

The International Ladies' Garment Workers Union, whose president, David Dubinsky, conferred with President Green in August 1938, in an effort to initiate new peace proceedings,<sup>125</sup> refused to

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<sup>120</sup> *New York Times*, Dec. 27, 1937, Jan. 12, 1938. See also the statement of Pres. Zaritsky of the United Hatters, *New York Times*, Jan. 17, 1938.

<sup>121</sup> The C. I. O. committee contended that a piecemeal solution had definitely been rejected. See Congress of Industrial Organizations, *Proceedings*, 1938, p. 94.

<sup>122</sup> *New York World-Telegram*, Jan. 13, 1938.

<sup>123</sup> *New York Times*, Dec. 22, 1937.

<sup>124</sup> American Federation of Labor, *Proceedings*, 1938, p. 103. For the full text of the revocation order, see the *New York Times*, Feb. 8, 1938.

<sup>125</sup> *New York Times*, August, 27, 1938.

join the new Congress.<sup>126</sup> The 1938 convention of the Federation took special pains to except this powerful union from the general condemnation of the C. I. O.<sup>127</sup> Although the I. L. G. W. U. remains virtually independent at the present time, it has definitely indicated its intention of rejoining the A. F. of L.,<sup>128</sup> a move that may have been prompted by its bitter jurisdictional fight with the Amalgamated Clothing Workers Union over bathrobe workers.<sup>129</sup>

At the 1938 convention of the Federation, Daniel Tobin, president of the Federation's largest affiliate, the Teamsters, demanded that the Federation's officers cease "calling men traitors and dictators and Judases," and characterized as "simply ridiculous" President Green's assertion that the C. I. O. had demanded unconditional surrender.<sup>130</sup> In spite of Tobin's threat to secede, the convention adopted a resolution calling for the ouster of Lewis. Mr. Lewis dramatically countered by offering to resign his leadership of the C. I. O. in consideration of the simultaneous resignation of Mr. Green, a proposition that the latter indignantly termed "an attempted fraud and deception of the public."<sup>131</sup>

The constitutional convention of the Congress of Industrial Organizations, held at Pittsburgh from Nov. 14 to Nov. 18, 1938, expressed its attitude toward the Federation in no uncertain terms:

The C. I. O. states with finality that there can be no compromise with its fundamental purpose and aim of organizing workers into powerful industrial unions, nor with its obligation to fully protect the rights and interests of all its members and affiliated organizations. The C. I. O. accepts the goal of unity in the labor movement and declares that any program for the attainment of such goal must embrace as an essential prelude these fundamental purposes and principles.<sup>132</sup>

The next peace plea came directly from the President of the United States in the form of almost identical letters to Messrs. Green and Lewis, calling for the resumption of negotiations:

first, because it is right; second, because the responsible officers from both groups seem to me to be ready and capable of making a negotiated and just

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<sup>126</sup> See the union's statement in the *New York Times*, Nov. 12, 1938.

<sup>127</sup> American Federation of Labor, *Proceedings*, 1938, pp. 372-373.

<sup>128</sup> *New York Times*, Nov. 21, 1939.

<sup>129</sup> *New York Times*, July 20, 1939, Nov. 19, 1939.

<sup>130</sup> American Federation of Labor, *Proceedings*, 1938, p. 386.

<sup>131</sup> *New York Times*, Oct. 12, 1938.

<sup>132</sup> Congress of Industrial Organizations, *Proceedings*, 1938, p. 96.

peace; third, because your membership ardently desire peace and unity for the better ordering of their responsible life in the trade unions and in their communities, and fourth, because the Government of the United States and the people of America believe it to be a wise and almost necessary step for the further development of the cooperation between free men in a democratic society such as ours . . . .<sup>133</sup>

Pursuant to this request, in March 1939, Lewis, Murray and Hillman of the C. I. O. met with Bates, Woll, Rickert and Tobin of the A. F. of L. in a new series of discussions. Lewis presented a novel solution in the form of a six point proposal:

1. A special convention would be held at which representatives of the A. F. of L., the C. I. O., and the railroad brotherhoods were to be represented.
2. This convention would organize a new American Congress of Labor.
3. Neither Lewis nor Green would be eligible for election to office by the convention. Green would receive a life tenure of his current salary.
4. The executive board of the new A. C. L. would be composed equally of A. F. of L. and C. I. O. representatives, with proportionate representation for the railroad brotherhoods, while one of the brotherhood officials would be its president.
5. The services of the U. S. Department of Labor would be utilized in settling jurisdictional problems.
6. President Roosevelt would be invited to preside at the convention.<sup>134</sup>

This plan was rejected by the A. F. of L. emissaries, who receded from their former position by offering to re-admit the original seceders with their *additional* members before holding a series of conferences to settle the jurisdictional problems created by the formation of the new C. I. O. unions.<sup>135</sup> Mr. Lewis apparently closed the door to further negotiation by stating publicly that peace was impossible because the A. F. of L. was in the hands "of a small group of leaders, firmly entrenched and reactionary in their attitude on public questions, who are tolerant of many evil conditions existing in the A. F. of L."<sup>136</sup>

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<sup>133</sup> *New York Times*, Feb. 26, 1939.

<sup>134</sup> *New York Times*, March 8, 1939.

<sup>135</sup> *Report of the Executive Council of the American Federation of Labor to the 59th Annual Convention, 1939*, p. 57.

<sup>136</sup> *New York Times*, June 15, 1939. Mr. Lewis charged that A. F. of L. leaders were in collusion with financial interests attempting to wreck the C. I. O., and that they were the recipients of "advertising" graft which would be cut off were the warring factions to be united.

President Roosevelt again addressed identical letters to the 1939 conventions of both organizations, calling for a resumption of negotiations.<sup>137</sup> Although each affirmed its readiness to take up the threads of the previous conferences, the lack of any common ground seems to preclude the consummation of the President's wish for the time being.

<sup>137</sup> The letter to the A. F. of L., which is similar in all important respects to that sent to the C. I. O., may be found in the *Proceedings* of the American Federation of Labor, 1939, pp. 277-278.

## CAUSES OF RIVAL UNIONISM

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The factors leading to rival unionism may be divided roughly into three categories. First, there are those arising out of the objectives, organization, practices and policies of trade unions themselves. A second group would include those fostered primarily by employers. Finally, certain omnipresent elements, such as race, nationalism and sectionalism, create latent dualistic propensities ready to mature under favorable conditions.

### A. OBJECTIVES, ORGANIZATION, PRACTICES AND POLICIES OF TRADE UNIONS

**Radical Dualism**—The conflicting social and economic beliefs of American workers have been exceedingly fertile sources of rival unionism. As the preceding chapter shows, there have been numerous attempts by radicals to oppose what they considered the treasonable opportunistic policies of old-line leaders. The latter, on the other hand, tend to regard their ideological opponents as impractical but none the less dangerous visionaries, to be extirpated from the labor movement at any cost.

Not all radical leaders have espoused the formation of rival unions as the most effective means of combating the conservatives. The relative merits of "boring from within" and "dualism" have been argued hotly in every left-wing publication. Nevertheless, the considerable majority, finding work within "business" unions slow and unrewarding, concluded that progressives should play the role of gadfly from without,<sup>1</sup> through the medium of independent unions, fashioned and managed in an exemplary manner. The roster of those who argued in this manner includes some of the best known names in American labor history—Debs, De Leon, St. John, Haywood, Ettor, and a host of others.

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<sup>1</sup> " . . . this dual union policy . . . prevailed as a dogmatic left wing gospel for 25 years." William Z. Foster, *From Bryan to Stalin* (London, 1935), p. 54.

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Revolutionary unionism has been defined as a "theory and interpretation of society and social relationships held by groups of militant wage workers, and an attempt to realize this theory and interpretation by means of a program of action."<sup>2</sup> The theories have ranged all the way from the mild class-consciousness of industrial unionism to the quasi-syndicalism of the I. W. W. and the simon-pure Marxism of De Leon. The programs of action, however, were generally neglectful of the axiom that "labor unions are built upon the solid rock of the material welfare of the workers, not upon their acceptance of stated political opinion."<sup>3</sup>

Saposs, the chronicler of American left-wing unionism, attributes its failure to the impracticability of many of the leaders, and to the neglect of such stabilizing practices as collective bargaining, trade agreements, the accumulation of strike funds, the check-off, the union button and the closed shop.<sup>4</sup> William Z. Foster's summary of the deficiencies of ideological rivalry is interesting, coming from one with a great many years of personal contact with it. He attributes the invariable demise of radical unionism to the unfamiliarity of the revolutionary slogans, the enmity of employers and government, the prestige of the A. F. of L., and the ability of the old unions to approach workers on a familiar plane with respect to religion and American traditions in general.<sup>5</sup>

Where radicals managed to achieve prominence in the "regular" labor organizations, they generally modified their anti-capitalistic attitudes to at least a grudging, and often whole-hearted, acceptance of the existing system. No better example could be cited than the career of the ex-Socialist, Samuel Gompers. Whether the left of the future will be able to profit from its mistakes of the past is at present a moot question, since the logical entrepreneurs of a new ideological movement have similarly submerged their beliefs, this

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<sup>2</sup> Robert F. Hoxie, *Trade Unionism in the United States* (New York, 1917), p. 163.

<sup>3</sup> William Z. Foster, *Bankruptcy of the American Labor Movement* (New York, 1923), p. 50.

<sup>4</sup> David J. Saposs, *Left Wing Unionism* (New York, 1926), pp. 126-131.

<sup>5</sup> Foster, *op. cit.* at n. 1, p. 55.

time in the business unionism of the C. I. O.,<sup>6</sup> although a resurgence is certainly not unlikely.

**Opportunistic Dualism**—Most rival unions have been opportunist in character, with practical rather than political or philosophical differences responsible for their formation and growth. This does not imply that similar practical problems do not create conditions under which ideological divergences may flourish as an additional motivating element.

(1) Exclusiveness of the American Federation of Labor—The A. F. of L. policy of granting exclusive control over an entire craft or trade to a single affiliate has already been mentioned.<sup>7</sup> So deeply ingrained has this concept become in the American labor movement that it is necessary to turn to England in order to appreciate that craft monopoly is not the *sine qua non* of labor organization.<sup>8</sup> Although its consummation would normally be expected to result in greater cohesion among labor unions, it has often had an opposite effect by dictating strenuous attacks upon poachers, thus tending to create acute rivalry where non-competitive dualism might have prevailed. It also was instrumental in preventing the absorption of

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<sup>6</sup> Several C. I. O. unions, particularly the National Maritime Union, the United Automobile Workers, the International Longshoremen's and Warehousemen's Union, and the Transport Workers Union were reputedly strongly influenced by the Communist Party. Nevertheless, each of these unions achieved phenomenal success in building strong, stable organizations within a short period of time through the use of traditional business methods. For a general discussion of this phase of the C. I. O., see Phillip Taft, "Some Problems of the New Unionism in the United States," *American Economic Review*, June 1939, p. 313.

<sup>7</sup> *Supra*, p. 6. See the American Federation of Labor, *Proceedings*, 1911, p. 333.

<sup>8</sup> "The multiplicity of separate organizations in which the six or seven million Trade Unionists are grouped, and the complication and diversity of the relations among the various societies, continue today, [1920] as they did thirty years ago, to baffle classification, and almost to defy analysis . . . . We estimate, however, that upon any computation the number of financially distinct organizations, which we may put at about 1,100, remains approximately what it was thirty years ago." Sidney and Beatrice Webb, *The History of Trade Unionism* (New York, 1920 ed.), p. 546.

It should not be inferred from this, however, that rivalry between English trade unions is no problem. See, in general, Sidney and Beatrice Webb, *Industrial Democracy* (London, 1920), chap. iv. The Webbs find that "to competition between overlapping unions is to be attributed nine-tenths of the ineffectiveness of the trade union world." *Ibid.*, p. 121.

many independent unions by the Federation when affiliates objected to the partially overlapping jurisdictions of candidates for admission.<sup>9</sup>

Craft monopoly was also responsible for bitter jurisdictional disputes between co-affiliates of the A. F. of L. Many of these were transformed into rival union controversies through the withdrawal, suspension or expulsion of one of the disputants. The revocation of the Brewery Workers' charter,<sup>10</sup> the suspension of the Amalgamated Society of Carpenters and Joiners<sup>11</sup> and Steam and Hot Water Fitters,<sup>12</sup> and the withdrawal of the International Association of Car Workers<sup>13</sup> may be cited as supporting examples. More recently, the controversies between the Brewers and the Teamsters,<sup>14</sup> and between the Actors and the Stagehands<sup>15</sup> threatened to result in rival unionism, and the former may yet do so. The American Federation of Labor, despite repeated attempts, has been none too successful in mitigating the deleterious effects of jurisdictional strife,<sup>16</sup> and rapid

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<sup>9</sup> In 1888 the Amalgamated Society of Carpenters was refused a charter because of objections raised by the United Brotherhood of Carpenters; the Western Federation of Miners, before gaining final admission, was denied affiliation in 1910 through the efforts of the International Association of Machinists and the Steam Engineers; Actors Equity was unable to enter the Federation for several years after its formation because the White Rats Actors' Union refused to relinquish its charter; negotiations for the admission of the "big four" railroad brotherhoods in 1919 were blocked at an early stage by the attitude of the Amalgamated Association of Street and Electric Railway Employees; the International Laborers Union, which applied for a charter in 1906, never did succeed in gaining entrance.

The 1900 convention adopted a resolution providing that no charters were to be issued without the consent of all organizations in contiguous fields. American Federation of Labor, *Proceedings*, 1900, p. 146.

<sup>10</sup> American Federation of Labor, *Proceedings*, 1907, p. 79. The Brewers were reinstated, however, at the insistence of the United Mine Workers.

<sup>11</sup> American Federation of Labor, *Proceedings*, 1912, pp. 107-111.

<sup>12</sup> Royal E. Montgomery, *Industrial Relations in the Chicago Building Trades* (Chicago, 1927), p. 128.

<sup>13</sup> American Federation of Labor, *Proceedings*, 1910, pp. 96, 98; *Ibid.*, 1911, pp. 323-325.

<sup>14</sup> This dispute was debated at length at the 1939 Convention. See American Federation of Labor, *Proceedings*, 1939, pp. 563-573, 591-616.

<sup>15</sup> For the events in this widely publicized affair, see the *New York Times*, July 24, 1939, August 1, 4, 5, 7, 8, 9, 11, 16, 19, 30, 31, 1939, September 1, 5, 1939.

<sup>16</sup> American Federation of Labor, *Proceedings*, 1900, p. 136; *Ibid.*, 1901, pp. 160, 230; *Ibid.*, 1902, p. 16; *Ibid.*, 1903, p. 217; *Ibid.*, 1904, p. 158; *Ibid.*, 1905, p. 23; *Ibid.*, 1906, p. 176; *Ibid.*, 1907, pp. 79, 299; *Ibid.*, 1915, p. 163. The following references contain more or less detailed

contemporary technological progress, by realigning tasks and skills, may be expected to increase the danger from this source.<sup>17</sup>

The coexistence of a craft and industrial union within the same or contiguous industries is almost certain to breed rivalry, unless the industrial union is willing to waive jurisdiction over all crafts that are separately organized. The files of the National Labor Relations Board are replete with instances of attempts by craft unions to carve out segments in which they possess a majority. The industrial unions, by the logic of their existence, are bound to oppose such moves, since their ability to exert economic pressure might be seriously impaired by the loss of strategic crafts.

(2) Personal Ambitions and Animosities—Local trade union leaders sometimes find it to their advantage to bring about the secession of the groups under their control from the national organization. Whether the cause be the possibility of personal gain or simply the inability to get along with superiors or the leaders of rival factions, the task of splitting-off is facilitated by the prevailing organization of American unions into largely autonomous local bodies. Alfred Fuhrman, once secretary of the San Francisco local of the United Brewery Workers, was a typical example of the completely opportunistic and ambitious professional labor organizer.<sup>18</sup> It will be recalled that the dislike of Gompers for Powderly, heartily reciprocated, had an important effect on the subsequent history of the labor movement.<sup>19</sup> More recently, a considerable factor in the perpetuation of the breach between the two opposing national feder-

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analyses of this aspect of industrial relations: Solomon Blum, *Jurisdictional Disputes Resulting from Structural Differences in American Trade Unions* (New York, 1913); Frederick S. Diebler, *The Amalgamated Woodworkers International Union of America* (Madison, Wis., 1912), pp. 168-193; William Haber, *Industrial Relations in the Building Industry* (Cambridge, 1930); Lewis L. Lorwin, *The American Federation of Labor* (Washington, 1933), pp. 342, 374-385; Frederick L. Ryan, *Industrial Relations in the San Francisco Building Trades* (Oklahoma, 1936); Nathaniel R. Whitney, *Jurisdiction in American Building Trades Unions* (Baltimore, 1914).

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<sup>17</sup> A recent case in point is the new television industry, over which the component divisions of the Associated Actors and Artistes of America are already squabbling.

<sup>18</sup> Herman Schluter, *Brewery Workers Movement in America* (Cincinnati, 1910), pp. 174 ff.

<sup>19</sup> Rowland H. Harvey, *Samuel Gompers* (Stanford University, 1935), p. 33.

ations, the C. I. O. and the A. F. of L., is the intense mutual distrust evinced by their respective officers.<sup>20</sup>

(3) Corruption and Racketeering—Labor racketeering is an exaggerated but nonetheless significant institution, responsible for several instances of vicious rival unionism. Sam Parks, a former New York building trade czar, established his own ironworkers union because the existing local acquiesced in an arbitration plan which he believed inimical to his control.<sup>21</sup> The equally notorious Robert Brindell organized a new House Wreckers Union when the regular organization refused to accede to his domination, and pulled out all construction workers on jobs where members of the latter were employed.<sup>22</sup>

Corrupt leadership is invariably accompanied by the complete eradication of trade union democracy. Honest members, fearful of challenging the authority of the ruling clique,<sup>23</sup> may be led to attempt reform through a new organization. This is a very dangerous business, and the new union is under an additional handicap in being unaffiliated and subject to attack as a "dual secessionist."

(4) Expulsions—The only recourse of workers expelled from a labor union for ideological or other reasons is to band together in a separate unit for purposes of mutual protection. The punishment of expulsion has most frequently been meted out to radicals. The Trade Union Unity League owed its origin in large measure to the anti-Communist drive that swept over the labor movement in the late nineteen-twenties. The railroad brotherhoods stirred up temporary rival movements by the wholesale eviction of post-war militants.<sup>24</sup> Because of the repercussions, responsible officials hesitate

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<sup>20</sup> Members of the Federation's Executive Council refer to John L. Lewis as a "Caesar," a "Judas," an autocrat and a dictator, while Sidney Hillman is considered his "Machiavelli." On the other hand Mr. Lewis, whose talent for invective is well known, apparently regards the mind of William Green as being a "little weak," and his actions those of a "traitorous renegade" and a "pusillanimous ingrate."

<sup>21</sup> Haber, *op. cit.* at n. 16, p. 357.

<sup>22</sup> Harold Seidman, *Labor Czars* (New York, 1938), p. 74.

<sup>23</sup> Seidman cites numerous examples of violence employed against would-be reformers. A recent example is the yet unsolved murder in New Jersey of Norman Redwood, of the New York Sandhogs Union.

<sup>24</sup> Sylvia Kopald, *Rebellion in Labor Unions* (New York, 1924), p. 166. The Brotherhood of Railway Trainmen alone expelled some 30,000 men.

to employ this surgical method of maintaining discipline unless their control is seriously threatened.

(5) Dissatisfaction with National Policies—Unwarranted deprivation of local autonomy by the parent organization is a common cause of withdrawal. The secession of many Illinois locals of the United Mine Workers in 1929,<sup>25</sup> and the disassociation of the American Federation of Textile Operatives from the United Textile Workers<sup>26</sup> turned on this issue. There may be more specific grievances, such as the refusal to accept nationally negotiated collective agreements<sup>27</sup> or dislike of the imposition of subordinate status as to representation or benefits,<sup>28</sup> that lead to rupture and the consequent chartering of a rival local by the national officers. On the other hand, locals may be expelled for failure to abide by national agreements or for infraction of other union rules.<sup>29</sup>

(6) Incomplete Organization of the Trade—By refusing or neglecting to organize all eligible workers, unions invite the formation of troublesome rivals. The International Alliance of Theatrical Stage Employees learned that closing the membership rolls to new members is in the long run an expensive proposition.<sup>30</sup> The "permit" system, whereby a non-union man, while not admitted to membership, is allowed to perform union work upon the payment of a fee, is likely to stir up resentment among the excluded workers and provide good material for the first organizer who comes along.<sup>31</sup>

<sup>25</sup> Louis Block, *Labor Agreements in Coal Mines* (New York, 1931), p. 21.

<sup>26</sup> *American Labor Yearbook*, 1922, Vol. IV, p. 159.

<sup>27</sup> In 1915 several locals of the Brick, Tile and Terra Cotta Workers Union seceded from the A. F. of L. because of what President Gompers himself termed a very poor collective agreement. American Federation of Labor, *Proceedings*, 1915, pp. 135, 337.

<sup>28</sup> The United Electrical, Radio & Machine Workers Union, the International Woodworkers Association, and the Transport Workers Union, now affiliated with the C. I. O., were formed originally from Class B or non-beneficial locals within their present A. F. of L. rivals.

<sup>29</sup> Saposs, *op. cit.* at n. 4, p. 117.

<sup>30</sup> See Robert O. Baker, *The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada* (Lawrence, Kansas), 1933, pp. 71-73.

<sup>31</sup> Haber, *op. cit.* at n. 16, p. 203. The dishonest officials who for many years controlled Local 306 of the New York Motion Picture Machine Operators grew fat on the proceeds of this system. In 1932, Local 306 had 1900 members and 650 permit-men, each of the latter paying \$200 in fees and dues. Chanan Kuselewitz, "Dual Unionism in New York City," (1934, Unpublished manuscript in the library of Columbia University).

High dues may operate to close a union to many workers and bring about the institution of more moderately scaled rivals.<sup>32</sup> Still another practice fundamentally injurious to union stability is the disdainful neglect of unskilled workers by skilled craftsmen, the fate of the Cigar Makers Union being the classic example.<sup>33</sup> The establishment of the Committee for Industrial Organization was based in large part upon the contention that the policies of the craft leaders, by making it difficult to enlist mass production workers, would eventually react to the disadvantage of organized labor as a whole.

(7) Miscellaneous—Rival unionism may simply be the product of historical accident, separately organized groups of workers retaining their independence for lack of any incentive to amalgamate.<sup>34</sup> Periods of rapid organization may produce a like result. In rare cases, division may be brought about by occupational rivalry between different classes of workers within the same union. The serious split in the International Brotherhood of Electrical Workers in the first decade of this century was due chiefly to conflict between "inside" and "outside" men.<sup>35</sup>

#### B. EMPLOYER INCENTIVES TO RIVAL UNIONISM

Employers, quick to perceive the advantages of division among their employees, have often stimulated competition between existing unions and endeavored to bring about the creation of new ones. Many "company" unions, sponsored originally by employers to counteract the inroads of trade unions, subsequently achieved real independence and remained to harry the first comer<sup>36</sup> and prevent the consummation of stable labor relations. New York theatrical

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<sup>32</sup> The chaotic conditions in the shoe industry may be attributed in part to the high dues policy of the Boot and Shoe Workers Union. Perlman and Taft, *op. cit.* at chap. ii, n. 19, p. 354. The Alteration Painters and Paperhangers Union of New York was formed in 1910 because immigrant painters could not afford the \$25 initiation fee required by the Brotherhood of Painters. Haber, *op. cit.* at n. 16, p. 298. See also Saposs, *op. cit.* at n. 4, pp. 102, 103.

<sup>33</sup> Saposs, *op. cit.* at n. 4, pp. 103-105.

<sup>34</sup> *Ibid.*, pp. 91-92.

<sup>35</sup> Charles F. Marsh, *Trade Unionism in the Electric Light and Power Industry* (Un. of Illinois, 1928), p. 33.

<sup>36</sup> Bulletin of the United States Bureau of Labor Statistics No. 634, *Characteristics of Company Unions 1935*, chap. xxii.

managers tried to fight the newly organized Actors Equity by helping a rival group, the Actors Fidelity League, only to find that when they were ready to capitulate to Equity, Fidelity demanded certain rights that might have prevented agreement had it not been for the tolerant attitude of Equity toward the rump unit.<sup>37</sup> The Empire State Motion Picture Operators' Union, which, to the despair of employers, still engages in periodic exchanges of stench bombs with Local 306, was conceived and launched by the Independent Theatre Owners' Association.<sup>38</sup>

The rift between the United Mine Workers of America and the Progressive Miners of America seems, at least in inception, to have been but another phase of the struggle between large and small coal companies. An investigating committee of the Illinois legislature reported that "the controversy is not only between the miners themselves but also between the operators, and, in the opinion of the committee, much of the blame for the strife can be laid at the doors of the operators themselves."<sup>39</sup>

### C. POTENTIAL SOURCES OF RIVAL UNIONISM

Sectionalism in the United States has facilitated labor separatism. The Western Federation of Miners, for example, was an indigenous Western organization. Sectional feeling still persists among large portions of the population,<sup>40</sup> particularly the rural, and may help to account for such events as the defection of the Southern Tenant Farmers Union from the Cannery and Agricultural Workers, and the rival unions of East and West Coast seamen.

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<sup>37</sup> The full story is told in Alfred Harding's *The Revolt of the Actors* (New York, 1929).

<sup>38</sup> *Affidavits of complainant* in *Esco Operating Corp. v. Empire State Motion Picture Operators Union*, N. Y. L. J., Oct. 7, 1933, p. 1207, Kings County Clerk Index No. 18929 (1933).

<sup>39</sup> Reprinted in the *United Mine Workers Journal*, Vol. 44, No. 14, p. 8. In at least one notable instance, an instrumentality of the federal government was directly behind the launching of a labor organization rival to several already in the field. This was the case of the Loyal Legion of Loggers and Lumbermen, sponsored during the World War period by Col. Disque of the War Department, in order to ensure an adequate supply of lumber. See M. Mittleman, "The 4 L's," 31 *Journal of Political Economy* 313 (1923), and Cloice R. Houde, *Industrial Relations in the West Coast Lumber Industry*, Bulletin of the United States Bureau of Labor Statistics No. 349 (1924).

<sup>40</sup> In general, see J. Davidson, *The Attack on Leviathan* (Chapel Hill, 1939), *passim*.

The fact that the United States is a nation of recent immigrants has made of nationality, religion and race, elements disturbing to organizational cohesion. Failure to grasp the psychology of foreign-born workers, and even to speak their languages, has been at the root of more than one unionizing campaign's miscarriage.<sup>41</sup> The widespread exclusion of negroes from American trade unions has given rise to a set of small negro groups that have been repeatedly played against white unions to the detriment of both.<sup>42</sup> Some unions, such as the International Ladies' Garment Workers Union, which is composed chiefly of Jews of all nationalities and Italians, with a sprinkling of other nationalities, have successfully combined many diverse elements into model organizations, but it remains to be seen whether they can just as successfully withstand the virulent racism that is spreading so rapidly.

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<sup>41</sup> Saposs, *op. cit.* at n. 4, pp. 111-116.

<sup>42</sup> *Monthly Labor Review*, Vol. 44, p. 292 (1937); Herman Feldman, *Racial Factors in American Industry* (New York, 1931), p. 27; Charles Franklin, *The Negro Labor Unionist of New York* (New York, 1936), pp. 103, 111-113, chap. v.

# 4

## RIVAL UNION TACTICS

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There are three possible solutions to active conflict between trade unions. In the first place, one of the combatants may be destroyed and its partisans reduced to the status of non-union workers. Since this may prove dangerous to the victor by making available to employers a potential reservoir of strike-breakers, absorption and merger have generally been the preferred methods of stifling rivalry. Less frequently, particularly in more recent times, competing unions have been able to agree upon some *modus vivendi*, short of outright amalgamation, that would enable them to co-exist harmoniously.

A common prelude to these eventualities is a period of bitter warfare, waged by all available means. Every labor organization has at its disposal certain basic weapons of attack and defense that it may employ under these circumstances. Nationally affiliated unions are advantageously situated in that the combined resources of the larger aggregation may be summoned when the need arises. Finally, important unilateral aid may be rendered by employers, if they are so disposed.

### A. WEAPONS AVAILABLE TO ALL UNIONS

(1) One of the malodorous aspects of American labor history has been the alacrity with which labor unions have supplied "scabs" in strikes called by rivals.<sup>1</sup> This practice, repugnant to the most elementary concept of working class solidarity, has been justified by the more articulate practitioners on the ground that the rival's destruction would eventually redound to the benefit of all by giving the survivor effective monopoly control over the labor supply, thus enabling it to ensure progressive increases in wage and hour standards. The political character of opponents, and their alleged anti-social aims, often provide additional justification. The American

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<sup>1</sup> This is not only an American practice, however, British unions having frequently resorted to it. Beatrice and Sidney Webb, *Industrial Democracy* (London, 1920), p. 120, footnote 1.

Federation of Labor had no qualms when it came to breaking I. W. W.<sup>2</sup> and T. U. U. L.<sup>3</sup> strikes, but similar methods have been used against non-revolutionaries and seceders.<sup>4</sup> Radical unions have been charged with the use of the same tactics against those whom they considered class enemies.<sup>5</sup> Even the staid railroad brotherhoods have more than once resorted to this procedure.<sup>6</sup>

<sup>2</sup> Brissenden, *op. cit.* at chap. ii, n. 21, pp. 116, 117, 191 ff., 204.

<sup>3</sup> William Z. Foster, "The Coal Strike," *The Communist*, July, 1931; Labor Research Association, *Mining Notes*, February, 1934, p. 5.

<sup>4</sup> "Again and again, when members of the Amalgamated [Clothing Workers] have been on strike, officers of the old union have negotiated an agreement with the employers, declared the strike at an end, called the workers back into the shops under their own jurisdiction, and if the strikers refused to return, attempted to fill their places with strikebreakers from the 'official' union." J. M. Budish and George Soule, *The New Unionism in the Clothing Industry* (New York, 1920), p. 91. Also, Charles E. Zaretz, *Amalgamated Clothing Workers of America*, (New York, 1934), pp. 106, 135, 137; *American Labor Yearbook* (New York, 1926), Vol. VII, p. 217.

When in 1923, Local 25 of the New York Newspaper Webb Pressmen's Union, affiliated with the International Printing Pressmen, struck against the advice of International President Berry, the latter opened offices at New York to recruit strikebreakers. Kopald, *op. cit.* at chap. ii, n. 39, pp. 182-184, 194.

In the Pacific Gas and Electric strike, 1913, the International Brotherhood of Electrical Workers furnished men to work on the jobs of a rival faction, despite the fact that the latter was the only non-A. F. of L. member of the Light, Heat and Power Council, which was running the strike. Helen Marot, *American Labor Unions* (New York, 1914), p. 99; Charles F. Marsh, *Trade Unionism in the Electric Light and Power Industry* (Urbana, Ill., 1928), p. 57.

<sup>5</sup> Such accusations, for instance, have been levied against the Needle Trades Workers Industrial Union and the Shoe and Leather Workers Industrial Union, T. U. U. L. See *The Workers Age*, March 5, 1932, March 14, 1933. The Alteration Painters Union, T. U. U. L., was also charged with "scabbing" on the Brotherhood of Painters in 1932: "Miller's Job, West End Ave. and 104 St. This was an open shop. The A. F. of L. picket committee took the men out on strike. The employer offered the settlement committee an agreement for \$8.00 per day, a raise of \$2 over what the workers were getting before the strike in this shop. The strike committee insisted on \$11.20 per day and the job was picketed by the strikers. The employer signed with the Alteration Painters Union for \$6.00 per day and eight members were sent to scab." *The Workers Age*, Dec. 1, 1932. Similar incidents are recounted at the same place.

<sup>6</sup> William Z. Foster, in his *Misleaders of Labor* (New York, 1927), p. 138, cites many instances of scabbing perpetrated by the Brotherhood of Railway Trainmen. Kopald, *op. cit.* at chap. ii, n. 39, pp. 151-2, quotes the following telegram sent by Vice President Whitney to all affiliates of the Brotherhood of Railway Trainmen in 1920, asking that switchmen be sent "to break the strike of Grunau's rival organization. Radicals are taking advantage of the situation during this period of reconstruction, but this should not deter our members who are willing to uphold the integrity of their agreements with the railroads . . . ." Members of the Order of Railway

The A. F. of L.-C. I. O. controversy has given rise to numerous incidents of the sort. The C. I. O. Committee on Legislation charged that A. F. of L. unions were "prone to scab and break strikes of C. I. O. unions by entering into collusive contracts with employers where they have no members solely for the purpose of defeating organizational activities of the C. I. O."<sup>7</sup> In a C. I. O. strike in Michigan, four hundred A. F. of L. workers effected forcible entry into the plant to restore normal operations.<sup>8</sup> The Molders Union drove one hundred and fifty C. I. O. sitdowners from the Robert and Manders factory in Hatboro, Pa., and resumed work.<sup>9</sup> The A. F. of L. signed with a strike bound shoe manufacturing establishment in Philadelphia, and was characterized by the C. I. O. regional director as a "strikebreaker extraordinary."<sup>10</sup> When the C. I. O. Transport Workers Union called its men off the Suburban Bus Co. of Yonkers, N. Y., the general organizer for the Amalgamated Association of Street and Electric Railway Employees announced that his organization would resist the strike and man the busses 100 percent.<sup>11</sup> Witnesses before the Senate Labor Committee testified that in the Oregon lumber war, so-called "goon squads" of strong arm strikebreakers were brought in by the unions.<sup>12</sup> In almost every case the action was justified on the ground that the rival was merely an obstructive rump organization with no real support among the workers.

(2) Not infrequently, labor unions strike to force the discharge of rival unionists. The effective use of this weapon is contingent

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Telegraphers on the Pennsylvania received this notice: "Strike is illegal, against four Brotherhoods and against railroads. Our existence is at stake. Our members justified under the circumstances in working in yard and road service to help us save our organization . . . . L. E. Sheppard, President, Order of Railway Conductors, Cedar Rapids, Iowa." See also Walter F. McCaleb, *The Brotherhood of Railway Trainmen* (New York, 1936), p. 96.

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<sup>7</sup> *New York Times*, June 14, 1939.

<sup>8</sup> *Ibid.*, September 29, 1937.

<sup>9</sup> *Ibid.*, March 10, 1938.

<sup>10</sup> *Ibid.*, August 30, 1938.

<sup>11</sup> *New York World-Telegram*, May 21, 1937.

<sup>12</sup> *Proposed Amendments to the National Labor Relations Act*, Hearings before the Senate Committee on Education and Labor, 76th Congress, First Session, pp. 1497, 1498. These hearings are hereafter referred to in this chapter as the *Senate Hearings*.

upon the ability to impede operations seriously, and is exceedingly dangerous if the rival is able to maintain production. The Carpenters Union has often employed this technique. "The Brotherhood of Carpenters, after blunderingly starting the revolution and finding itself already starved when the real tumult began, hurried to sign the employers agreement; and thus by an unconditional surrender to the employers it won a victory over its rival, for the Amalgamated Carpenters by delaying to sign were permanently disbarred."<sup>13</sup> In the spring of 1939, Homer Martin overestimated the power of his automobile union, and by calling an ineffectual strike against the United Automobile Workers Union, revealed his own weakness and sustained a defeat from which recovery will be difficult.<sup>14</sup>

Counterpicketing has been developed as a defense against this tactic, especially where picketing, through its appeal to consumers, seriously affects sales. In a collective agreement between the Independent Theatre Owners Association of New York and the Empire State Motion Picture Operators Union, there was a clause making it mandatory for the latter to picket any theater employing members of a rival, Local 306, in the event that 306 picketed Empire employers. "This picketing was necessary to protect the box-office receipts of the theatre owners contracting with the Empire State Motion Picture Operators Union, Inc., and was a very vital duty imposed upon the Empire by its employing owners."<sup>15</sup> The C. I. O. resorted to similar measures to counteract the patrolling of Newark, N. J. haberdashery shops by the Federation.<sup>16</sup> In a New York City drug store strike, C. I. O. workers picketed A. F. of L. picketers with signs bearing the legend, "This Store Is 100% C. I. O."<sup>17</sup>

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<sup>13</sup> John R. Commons, "The New York Building Trades," 18 *Quarterly Journal of Economics* 409 (1904); See also Whitney, *op. cit.* at chap. i, n. 1, p. 132.

<sup>14</sup> *New York Times*, June 23, 1939.

<sup>15</sup> *Esco Operating Corp. v. Empire State Motion Picture Operators Union*, N. Y. L. J., October 7, 1933, p. 1207, Kings County Clerk Index No. 18929 (1933), affidavit of John Blatt.

<sup>16</sup> *New York Times*, May 30, 1937. Counsel for the C. I. O. union involved said that picketing would continue until the A. F. of L. withdrew its pickets.

<sup>17</sup> *New York World-Telegram*, June 22, 1938. Similar events have occurred in the New York restaurant industry: *New York Times*, Oct. 13, 1939.

(3) Violence is an all too frequent adjunct of inter-union strife. The bloody warfare between the rival fur workers in New York, and the U. M. W. A.—P. M. A. fracas in Illinois were cited above. More recently, headlines like the following have been appearing in the press fairly regularly:

SHOTS FROM C. I. O. OFFICE WOUND 9 OF RIVAL UNION.  
SHOOTING AT GALENA, KAN., CLIMAXES DAY OF ATTACKS  
ON LEWIS'S LEAD MINE FOLLOWERS AND WRECKING  
OF TWO OF THEIR BASES.<sup>18</sup>

7 HURT IN C. I. O.-A. F. L. RIOT OVER WHICH SHALL PICKET  
PLANT.<sup>19</sup>

ACTORS RETALIATE ON FILM PICKETS. WARN OF "WRECK-  
CREW" TO DRIVE AWAY FROM STUDIO STRIKERS  
WHO MOLEST THEM.<sup>20</sup>

LEWIS MEN REPEL A. F. OF L. WORKERS. ATTEMPT TO REOPEN  
MILL AT AMBRIDGE, PA. FAILS AS HUNDREDS DEFEND  
GATES. TEAR GAS ENDS FIGHT. TWENTY ARE BEATEN,  
ANOTHER IS STABBED.<sup>21</sup>

FOUR HURT IN FREE-FOR-ALL OF RIVAL UNIONS.<sup>22</sup>

RIVAL UNIONS BATTLE AGAIN. SIX PERSONS INJURED.<sup>23</sup>

RIVAL UNION GROUPS RIOT. A. F. L. WOMEN WORKERS  
PIERCE C. I. O. PICKET LINE IN OHIO.<sup>24</sup>

(4) Attempting to discredit a rival by the application of allegedly opprobrious names is another oft-employed strategem. The opponent may be labeled a "red," a "communist," or an "anarchist" union seeking to destroy American institutions, while the accuser holds it—

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<sup>18</sup> *New York Times*, April 12, 1937. "The 'blue-card' miners came to Galena at 4 P. M. after having wrecked the International union offices in Picher and Treece, Kan., two miles from Picher. They had also chased Constable Ray Keller of Hockerville, Okla. out of town after flogging him as a C. I. O. sympathizer. More than 100 members of both factions were injured in dozens of encounters."

<sup>19</sup> *New York World-Telegram*, April 7, 1938.

<sup>20</sup> *New York Times*, May 23, 1937.

<sup>21</sup> *Ibid.*, June 16, 1937. "As the chanting workers approached the factory, the pickets took up a challenging refrain 'Don't let them through; don't let them through'. The returning workers, seeing themselves outnumbered, retreated after several minutes of fighting, dragging their wounded and injured fellows to waiting automobiles."

<sup>22</sup> *New York Times*, August 18, 1937. See also the *New Republic*, February 2, 1938, p. 361.

<sup>23</sup> *New York Times*, June 15, 1939. "About 200 men battled at close quarters in the first outbreak, using fists and clubs until seventy-five policemen broke up the fight." The participants were members of rival factions of the Automobile Workers Union.

<sup>24</sup> *New York Times*, July 1, 1938.

self out as a patriotic organization acting to preserve democracy. The United Mine Workers denounced the Progressive Miners Association as a group "started for the sole and only purpose of destroying the United Mine Workers of America and setting up a Communist organization in its place, with a view to starting an armed revolution to overthrow the government of the United States."<sup>25</sup> In a letter to his staff, President Wharton of the International Association of Machinists expressed the belief that "employers have expressed a preference to deal with A. F. of L. organizations rather than Lewis, Hillman, Dubinsky, Howard and their gang of sluggers, communists, radicals, and soap-box artists, professional bums, expelled members of labor unions, outright scabs and the Jewish organizations with all their red affiliates."<sup>26</sup>

The author has seen many handbills put out by A. F. of L. locals appealing to workers to join "real American" unions and to forego "Moscow-controlled" rivals. An observer in California reported that the "red scare is being whipped up all through California but particularly in Los Angeles, and it has already weakened many C. I. O. groups. The whole officialdom of the A. F. of L. has joined in the hue and cry. At the state convention a veritable witch-hunting campaign was launched against what State Secretary Edward D. Vandeleur described as 'the C. I. O.-Moscow combine'."<sup>27</sup> The C. I. O. retaliates by calling A. F. of L. leaders "reactionaries" and "racketeers."

(5) Drastic concessions on wages and hours are often offered to employers in exchange for help against competing unions. "Thus, in the fur industry, the Fur Workers Industrial Union was accused by the A. F. of L. union of offering to renew an expiring contract in 1933 which provided for a 35 hour week, for a 40 hour week at the same wage rate in order to undermine the A. F. of L. union."<sup>28</sup>

<sup>25</sup> *United Mine Workers Journal*, Vol. 44, No. 9, p. 3 (1933).

<sup>26</sup> Quoted by Walsh, *op. cit.* chap. ii, n. 80.

<sup>27</sup> Oliver Carson, "Los Angeles Grows Up," *The Nation*, January 8, 1938.

<sup>28</sup> Henry Siegel, "Left Wing Unionism in the United States" (Unpublished manuscript in the library of Columbia University, 1935), p. 84. Similar instances are cited in the *Senate Hearings*, p. 1239, and in the *Hearings on the Proposed Amendments to the National Labor Relations Act*, Committee on Labor, House of Representatives, 76th Congress, First Session (hereinafter referred to as *House Hearings*), p. 694.

William Randolph Hearst's *Los Angeles Examiner* made its initial appearance in 1903 because of a rival union dispute. When the printers of the *Los Angeles Times*, who were members of the International Typographical Union, went on strike, their places were filled by the International Printers Protective Fraternity. The I. T. U. instigated the establishment of the competing newspaper to weaken both the *Times* and the Fraternity.<sup>29</sup>

When all else fails, bribery may prove a successful last resort. The organizer for the Empire State Motion Picture Operators Union was reputedly offered a down payment of \$50,000 in cash, and further instalments, by the rival Local 306 for help in breaking up the Empire Union. "A short time thereafter, two circuits controlling 33 theatres, at which Empire men were employed under contract, cancelled their contracts with Empire and discharged the Empire men . . . . Upon information and belief, one of the circuits was paid the sum of \$20,000 by Local 306 for cancelling its contract, while the other circuit was paid \$50,000 for doing likewise."<sup>30</sup>

#### B. WEAPONS AVAILABLE THROUGH AFFILIATION WITH A NATIONAL ORGANIZATION

(1) The labor boycott, rarely effective if only local in scope, has been used widely against rival unions. Back in 1891, the Convention of the American Federation of Labor resolved to boycott L. Lippman & Sons, who had favored Local Trade Assembly 231 of the Knights of Labor.<sup>31</sup> The United Brotherhood of Carpenters is in a particularly strategic position to institute boycotts because of the wide dispersion of its membership. An early rival, the Amalgamated Wood Workers Union, was practically destroyed in this

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<sup>29</sup> George E. Barnett, *The Printers* (Cambridge, 1909), pp. 271 ff. Fraternity was apparently an employer dominated union.

<sup>30</sup> *Esco Operating Corp. v. Empire State Motion Picture Operators Union*, N. Y. L. J., Oct. 7, 1933, p. 1207, Kings County Clerk Index No. 18929 (1933), affidavit of John A. Springer.

<sup>31</sup> American Federation of Labor, *Proceedings*, 1891, p. 29. For accounts of mutual boycotting between the A. F. of L. and the K. of L., see Harry Laidler, *Boycotts and the Labor Struggle* (New York, 1931), p. 83; Ware, *op. cit.* chap. ii, n. 2, chap. xi; Leo Wolman, *The Boycott in American Trade Unions* (Baltimore, 1916), p. 29.

way.<sup>32</sup> Several years ago it placed on the unfair list lumber produced by the International Woodworkers Association, a C. I. O. affiliate, and enlisted the Teamsters union in support of the ban.<sup>33</sup> In a letter to Attorney General Cummings, Senator Steiwer of Oregon asserted that as a result of the boycott fifty-three sawmills and logging companies were being blacklisted; that business agents of the Carpenters were canvassing retail dealers and supplying them with unfair lists; that cancellations of orders were numerous.<sup>34</sup> Many mills were forced to close down altogether, and the loss was reported to have run into millions.<sup>35</sup> The net result was that Oregon, theretofore one of the more liberal states from the point of view of labor legislation, adopted by referendum a severe anti-picketing measure.

(2) The increasing dependence of productive enterprise upon transport facilities makes it possible for the transport unions to establish virtual economic blockades through the withdrawal of their members. The International Brotherhood of Teamsters has employed this potent weapon against C. I. O. rivals. In July 1937, the Joint Teamsters Council of Philadelphia declared a "general holiday" to protest an invasion of what it considered its jurisdiction by C. I. O. bakery unions. Newspapers were suspended, food deliveries were temporarily stopped, and more serious consequences might have followed had not a settlement been reached to the satisfaction of the Teamsters.<sup>36</sup> Less successful was the attempt to wrest control of the Pacific Coast warehouse workers from the International Longshoremen's and Warehousemen's Union. All shipping from San Francisco and Oakland was tied up by the refusal of the Teamsters to haul merchandise, but the readiness of the C. I. O. longshoremen to cross the picket line, plus the unwillingness of other

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<sup>32</sup> Frederick S. Deibler, *The Amalgamated Woodworkers International Union of America* (Madison, Wis., 1912), *passim*; William Kirk, *National Labor Federations in the United States* (Baltimore, 1906), p. 99.

<sup>33</sup> *New York Times*, August 17, 1937.

<sup>34</sup> 1 *Labor Relations Reporter* 20, January 17, 1938.

<sup>35</sup> Vivid accounts of the use of these measures may be found in the *Senate Hearings*, pp. 942-968, 1482-1483, 1516-1528.

<sup>36</sup> *New York Times*, July 3, 1937.

groups of A. F. of L. men to join the blockade, forced its termination.<sup>37</sup>

(3) The positive analogue of the boycott is the union label. If business men and the public can be induced to buy goods bearing the label of a particular union, rivals will find it more difficult to market their products. The Boot and Shoe Workers Union has always leaned heavily on this device.<sup>38</sup> Both the A. F. of L. and the C. I. O. have recently given evidence of an intent to popularize their respective labels.<sup>39</sup>

(4) Sympathetic strikes may be called by federated bodies in support of the jurisdictional claims of constituents. This has been particularly prevalent in the building trades, where the close interrelation of numerous crafts necessitated concerted action against aggressors,<sup>40</sup> and thus paved the way for united aggression.

(5) Of particular value to a hard pressed union is the protection afforded by a joint closed shop with a sister affiliate. The employer is thereby given the option of getting all or none of his labor from the federated bodies. From 1913 to 1928, the International Alliance of Theatrical Stage Employees had such a joint agreement with the American Federation of Musicians, but it was terminated because the discharge of union musicians attendant upon the introduction of talking pictures rendered the arrangement a burdensome liability to the former organization.<sup>41</sup> An entente of this nature is

<sup>37</sup> *New York Times*, September 4, 9, 26, 1937; *New York World-Telegram*, October 5, 1937; *House Hearings*, p. 2124.

<sup>38</sup> Perlman and Taft, *op. cit.* at chap. ii, n. 19, p. 354; Saposs, *op. cit.* at chap. ii, n. 17, pp. 106, 120, 124.

<sup>39</sup> At a meeting of the Executive Council of the Federation in 1938, President Green reported: "The American Federation of Labor is going into the merchandising business. We propose to leave no stone unturned in delivering the union market to the worthy American manufacturers who employ members of unions affiliated with the A. F. of L." 1 *Labor Relations Reporter* 23, February 7, 1938. See also the report of similar action at a meeting of the C. I. O. executive board, *New York Times*, June 14, 1939.

<sup>40</sup> Ryan, *op. cit.* at chap. iii, n. 16, pp. 69-70; testimony of Jason B. Evans of the International Union of Operating Engineers, Senate Committee on Education and Labor, *Hearings on S. 1958*, 74th Congress, 1st Session, p. 767.

<sup>41</sup> Baker, *op. cit.* at chap. iii, n. 30, p. 78.

most effective in an industry in which several crafts are jointly employed in a single process.<sup>42</sup>

(6) The American Federation of Labor has been able to exert a great deal of pressure upon recalcitrant rivals through city and state federations. There are indubitable advantages, from the point of view of both prestige and finance, connected with membership in local central bodies. For instance, the Seattle Labor Temple Association was ordered to cease renting offices and meeting halls to an unaffiliated iron-workers union,<sup>43</sup> depriving the latter of the opportunity to secure necessary facilities at cheap rentals. When a local is suspended or expelled, its membership in central bodies is generally cancelled. This was the fate of the C. I. O. unions, but they have been strong and numerous enough to form their own federations in many localities.

### C. EMPLOYER ASSISTANCE

Aid from employers is always an 'important and serious matter. In the C. I. O.-A. F. of L. struggle, the latter appears to have the incalculable advantage of being favored by most business men.<sup>44</sup> Concrete help may be rendered in a variety of ways, many of which have been outlawed by the National Labor Relations Act. Wage increases granted through the favored organization or evidence of a greater readiness to adjust grievances with it, may add to the discomfiture of its rival.<sup>45</sup> The National Labor Relations Board condemns many similar practices, including the "refusal to allow solicitation of membership by one union on board . . . ships, while permitting a rival union to do so"; solicitation on behalf of one union by company officials and foremen; the distribution of membership cards; the discharge of employees for failure to join the favored organization; the grant of the closed shop in clearly discriminatory

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<sup>42</sup> Frank T. Stockton, *The Closed Shop in American Trade Unions* (Baltimore, 1911), p. 117. The hotel, restaurant, and building service workers in New York, all affiliated with the A. F. of L., have used this scheme with success.

<sup>43</sup> American Federation of Labor, *Proceedings*, 1927, p. 381.

<sup>44</sup> The Federation does not deny this. See *infra*, p. 49. Also, the *House Hearings*, pp. 2091-2095, for specific examples of a flagrant nature.

<sup>45</sup> *Characteristics of Company Unions*, 1935. Bulletin of the Bureau of Labor Statistics No. 634, pp. 196-197.

circumstances; and the furnishing of facilities, such as bulletin boards, mimeograph machines, stenographic services, and office space, to one union but not to its competitor.<sup>46</sup> Even expressions of opinion by employers might, under some circumstances, permit them "full freedom to wage a full-fledged electioneering campaign on behalf of the union . . . favored."<sup>47</sup> This list could be extended indefinitely with illustrations drawn from the Board's experience.

The ultimate purpose of the various practices outlined is to destroy the rival against which they are employed. There have been numerous instances in the past, however, of mutual respect and toleration exercised by rival unions, based either upon unwritten understanding or definite agreement. The former arrangement was not uncommon where labor unions were confined to restricted territorial jurisdictions and made no attempt to expand their boundaries. For many years the Allied Shoe Workers, the United Shoe Workers and the Shoe Workers Protective Union shared the North Shore of Massachusetts between them harmoniously, while the Boot and Shoe Workers Union confined its efforts chiefly to the South Shore.<sup>48</sup> The line of demarcation may be merely conventional rather than territorial, the rival teamsters unions in Chicago<sup>49</sup> and bakery workers in New York<sup>50</sup> affording good illustrations of this practice.

Saposs found that "it is only infrequently that rival unions come into serious conflict in the same jurisdiction . . . . While from time to time warfare breaks out, yet if both unions are strong, neither dares risk a decisive battle; skirmishes go on along the frontiers of control

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<sup>46</sup> National Labor Relations Board, *Third Annual Report for the Fiscal Year Ended June 30, 1938*, pp. 63-68, 88 ff, 113-114.

<sup>47</sup> *Report of the National Labor Relations Board to the Senate Committee on Education and Labor*, April, 1939, on S. 1000, etc., (mimeographed), p. 64.

<sup>48</sup> Galster, *op. cit.* at chap. ii, n. 49, *passim*. A similar arrangement seems to prevail in the Rhode Island textile industry where, according to a spokesman for the Independent Textile Union of America, that organization maintains amicable relations with the competing A. F. of L. and C. I. O. unions. *Senate Hearings*, pp. 3443-3461. Similarly, in Utah the C. I. O. and the A. F. of L. had a tacit agreement, whereby each respected the jurisdiction of the other. *Ibid.*, pp. 1790-1800.

<sup>49</sup> Sterling Rigg, "The Chicago Teamsters Union," *Journal of Political Economy*, Vol. xxxiv, February, 1926.

<sup>50</sup> *Nann v. Raimist*, 255 N. Y. 307 (1931).

afforded by the vast area which is totally unorganized."<sup>51</sup> This statement certainly requires modification in the light of contemporary events. The willingness of unions to temporize has to a large extent vanished, and been replaced by "bitter and destructive conflict." Where forbearance might have been extended to small independents which could reasonably be expected to last but a short time, no quarter can be extended to affiliates of a large rival federation offering a serious challenge to the very existence of its opponents. The great increase in the number of unionized workers, and the consequent limitation of the frontiers of new organizational endeavor, further serve to accentuate the conflict.

Jurisdictional allocation by definite agreement has been practiced, although infrequently. The United Brotherhood of Carpenters, in the early days of its campaign against the Amalgamated Society of Carpenters, compromised a dispute in the New York market by entering into an arrangement permitting members of both organizations to work on the same job.<sup>52</sup> The struggle between the Operative Plasterers and the Bricklayers was temporarily allayed by a treaty providing in part "that if in any city where there is a local union composed of the three trades [bricklayers, masons, plasterers], there are three . . . plasterers who are members and there are at least five resident plasterers who are not members, the Operative Plasterers shall be conceded the right to establish a local union."<sup>53</sup> Actors Equity, when finally successful in gaining virtual control of its trade, made definite provision in a collective agreement signed with the employers for the members of a rival group, the Actors Fidelity League.<sup>54</sup>

Mutual recognition and interchange of working cards are another method of effecting a similar result. Stockton cites this arrange-

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<sup>51</sup> David J. Saposs, "Dual Unionism," *Encyclopedia of the Social Sciences*, Vol. V, p. 259.

<sup>52</sup> Perlman and Taft, *op. cit.* at chap. ii, n. 19, p. 88.

<sup>53</sup> Quoted in Whitney, *op. cit.* at chap. i, n. 1, p. 70.

<sup>54</sup> Paul F. Gemmil, *Collective Bargaining by Actors*, Bulletin of the Bureau of Labor Statistics No. 402, p. 18; Alfred Harding, *The Revolt of the Actors* (New York, 1929), p. 494. A list of Fidelity members was drawn up, and those named thereon were permitted to play with Equity actors without payment of a fee required of other non-members. Fidelity was forbidden to recruit any additional members, however.

ment as having prevailed for a limited time between the United Garment Workers and the Shirt, Waist and Laundry Workers, and between the Brotherhood of Carpenters and the Amalgamated Carpenters.<sup>55</sup> In rare instances, workers in a disputed trade have been required to join two unions.<sup>56</sup>

There seems little chance that any of these palliatives will be applied in the near future. It is unlikely that complete destruction of either the A. F. of L. or the C. I. O. will occur, but unless strong pressure from the national administration can effect a thoroughgoing settlement, the probabilities are that there will be a long war of attrition characterized by grudging respect for the enemy's strongholds and frequent raids upon his outposts.

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<sup>55</sup> Stockton, *op. cit.* at n. 42, p. 65.

<sup>56</sup> This was done in a dispute between Stone Cutters and Bricklayers in Washington. Whitney, *op. cit.* at chap. i, n. 1, p. 160. Mr. John P. Frey of the A. F. of L. testified that members of his organization have often been forced to pay dues to dominant C. I. O. unions in order to retain their jobs. *Senate Hearings*, p. 1012. If the A. F. of L. union in such case should prohibit dual membership, as most of them do, the unfortunate worker might be deprived of any benefits he might have received through remaining in the A. F. of L. The shoe is on the other foot as well, however.

## LEGAL PRINCIPLES

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The legal principles upon which the courts have based their decisions in cases involving rival unionism have for the most part been borrowed either from the common law of commerce or from the neighboring field of simple master-servant relationships. The recognition of rival union disputes as a distinct and separate category has been slow in coming, and even in those jurisdictions where it has arrived the tendency is to adapt received ideas, often not strictly applicable, to the new use, rather than to attempt the development of indigenous attitudes having a greater relevancy to the factual situations presented. The purpose of the following enumeration of basic principles is not to add another to the many compendia already published,<sup>1</sup> but rather to indicate the ways in which each of these fundamental concepts has been employed by judges in their quests for logical solutions to the knotty problems under consideration herein.

### A. THE DOCTRINE OF CONSPIRACY

The essence of this theory is stated succinctly in an early case: "The result of . . . greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals."<sup>2</sup>

Applied with success by employers in their legal struggles against the rising tide of trade unionism, agile union attorneys recognized its potentialities for fighting rival unions. It seemed clear that an individual workman had no right to be protected against the competition of his fellow-workmen individually;<sup>3</sup> but when confronted

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<sup>1</sup> Among the most useful are E. E. Witte, *The Government in Labor Disputes* (New York, 1933), pp. 46-60; Felix Frankfurter and Nathan Greene, *The Labor Injunction* (New York, 1932), pp. 1-46; J. Louis Warm, "A Study of the Judicial Attitude Toward Trade Unions and Labor Legislation," 23 *Minnesota Law Review* 255-362 (1939).

<sup>2</sup> *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 (1906).

<sup>3</sup> *Walker v. Cronin*, 107 Mass. 555 (1871).

with the superior economic competition of an *association* of those fellow workmen, he became a fit subject for equitable aid on the ground that such competition, presumably having as its object the lawful capture of his employment by an individual member of the association, became unlawful through the mere fact of unequal bargaining power.<sup>4</sup> From this proposition it was an easy, logical step to substitute for the oppressed individual an equally oppressed group of individuals.<sup>5</sup> Not all combination was unlawful, nor was every association oppressive; the distinction between lawful and unlawful combination necessarily involved tacit assumptions as to the relative strength of the competing groups,<sup>6</sup> with the result that when judges failed to consider the factor of inequality<sup>7</sup> the doctrine of conspiracy was inapplicable to disputes between unions.<sup>8</sup>

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<sup>4</sup> This governing idea, expressed in different terms, may be found in the early cases of *Arthur v. Oakes*, 63 Fed. 310 (1894); *People v. Wilzig*, 4 N. Y. Crim. 403 (1886).

<sup>5</sup> *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011 (1900); *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327 (1903); *Michaels v. Hillman*, 112 Misc. 395, 183 N. Y. S. 195 (1920); *Coon Co. v. Meinhart*, 183 N. Y. S. 713, 112 Misc. 650 (1920). Justice Vann's vigorous dissent in *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902) illustrates the way in which the transition was accomplished: "The law gives all men an equal chance to live by their own labor, and does not permit one labor union to seize all the chances, by compelling employers to refuse employment to the members of all other unions."

<sup>6</sup> For if it be conceded that competing unions stand upon a plane of equality, it is difficult to see how either one, acting through lawful means for purposes not "unlawful, oppressive, or immoral" could be guilty of a technical conspiracy. It is not the power of a combination in the abstract, nor its capacity for doing evil, but its concrete power to oppress a particular individual or group of individuals, that the courts regard as a legitimate object of prohibition. Oppose, then, a combination to an equally strong group and it is at once obvious that, as against the latter, the former possesses no coercive advantage. The fundamental proposition thus fails. The language of *Arthur v. Oakes*, 63 Fed. 310 (1894), is instructive: "An intent upon the part of a single person to injure the rights of others or of the public is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent. But a combination of two or more persons with such an intent, and under circumstances that give them, when so combined, a power to do an injury they would not possess as individuals acting singly, has always been recognized as in itself wrongful and illegal."

<sup>7</sup> This was the approach in *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 (1906) and *Reform Club v. Laborers Union*, 29 Misc. 247, 60 N. Y. S. 388 (1899).

<sup>8</sup> "... competition between labor unions is lawful, and the acts pleaded in furtherance thereof, even to the extent of threatening strikes in furtherance

The decreasing significance of the theory in ordinary employer-employee disputes of late<sup>9</sup> has been accompanied by its decline as a controlling factor in rival union difficulties. Its early importance has left a mark upon legal terminology, but the tendency is toward an impatient rejection of the legal effect of mere combination.<sup>10</sup> It is no exaggeration to say that the term "conspiracy" has neither the potency nor usefulness which it possessed at the turn of the century.<sup>11</sup>

### B. THE MALICE DOCTRINE

Under this doctrine, fundamental emphasis shifts to an inquiry into the motives which actuate labor unions in their activities. If the court finds that the primary purpose of a strike is one of self interest—for example, to better the conditions of employment of union members—it will generally regard the strike as lawful, barring other unlawful circumstances. If, on the other hand, the court interprets the strike as being directed toward the injury of an employer or of a rival union, it will condemn the strike. The relevancy of such an inquiry is made clear in the early case of *Plant v. Woods*:

It is said . . . that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial . . . . If the meaning of this and similar expressions is that, where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of motive, has a lawful right to do a thing, the act is lawful

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of such lawful object, are lawful and proper. There can be no conspiracy to perform lawful acts in furtherance of a lawful purpose." *Terrio v. Neilson Construction Co.*, C. C. H. par. 18,466 (U. S. D. C. 1939).

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<sup>9</sup> Witte, *op. cit.* at n. 1, p. 55; Frankfurter and Greene, *op. cit.* at n. 1, p. 4. This phenomenon has in large measure been due to the rise of the corporation, making ludicrous the ascription to a combination of workmen of overwhelming coercive power as against the employer.

<sup>10</sup> See *United Baker Workers v. Messing*, *New York Law Journal*, Feb. 19, 1926, p. 2040. Hereafter, the *New York Law Journal* will be cited as *N. Y. L. J.*

<sup>11</sup> There bids fair to be a revival at the hands of the United States Department of Justice. Mr. Thurman Arnold, in a public statement, indicated that jurisdictional disputes tending to restrain interstate commerce would come under the ban of the anti-trust laws. *New York Times*, Nov. 20, 1939. Whether he includes rival union disputes in this category remains to be seen. See also Louis B. Boudin, "The Sherman Act and Labor Disputes," 39 *Columbia Law Review* 1283 (1939).

when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate.<sup>12</sup>

This rationale, in conjunction with the oft indistinguishable principle of "just-cause,"<sup>13</sup> is, in contrast to the rather antiquated doctrine of conspiracy, of paramount importance in the modern law relating to rival unionism. In many cases,<sup>14</sup> the strategic but not very realistic question has been put as follows: Is a union, in waging war upon a rival, actuated by the beneficent desire to improve the status of its own members, or is it prompted by the malignant desire to destroy the organization of the group opposing it, or injuriously invade the rights of that group?

Direct judicial ascertainment of the psychological mainsprings of trade unionists would, of course, be impracticable. Characteristically, the process has been inverted; the usual procedure entails a scrutiny of the facts, and from them the imputation to the actors of those attitudes which the court regards as prerequisite to the ensuing course of events. The result of this vague process has been to create a wide "area of judicial discretion within which diversity of opinion finds ample scope." Discovery of different motives from substantially similar sets of facts has been the usual concomitant.

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<sup>12</sup> *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011 (1900).

<sup>13</sup> See *infra*, pp. 58-61.

<sup>14</sup> *Chicago Federation of Musicians v. American Musicians Union of North America*, 139 Ill. App. 65 (1908); *Dorrington v. Manning*, 4 Atl. (2d) 886 (Pa. 1939); *Fairbanks v. McDonald*, 219 Mass. 291, 106 N. E. 1000 (1914); *Goyette v. Watson*, 245 Mass. 577, 140 N. E. 285 (1923); *Graves v. McNulty*, 13 Ohio N. P. N. S. 110 (1912); *Hotel and Restaurant Union v. Miller*, 272 Ky. 466, 114 S. W. (2d) 501 (1938); *Jordan's Wearing Apparel, Inc. v. Retail Sales Clerk Union*, 193 Atl. 806 (N. J. 1937); *McKay v. Retail Salesmen's Union*, 89 Pac. (2d) 426 (Cal. Dist. 1939); *Restful Slipper Co., Inc. v. United Shoe and Leather Workers Union*, 116 N. J. Eq. 521 (1935); *Esco Operating Co. v. Kaplan*, 144 Misc. 646, 258 N. Y. S. 303 (1932); *Fox v. Gold*, N. Y. L. J., Jan. 20, 1932; *Herzog v. Cline*, 131 Misc. 816, 227 N. Y. S. 462 (1927); *Klappholz v. Goodleman*, *Kings County Clerk Index* 16025 (1921); *Michaels v. Hillman*, 112 Misc. 395, 183 N. Y. S. 195 (1920); *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902); *Park Lane Baking Co. v. Christel*, N. Y. L. J., July 11, 1930, p. 1865; *Pleaters and Stitchers Association v. Taft*, 131 Misc. 506, 227 N. Y. S. 185 (1928); *Public Baking Co. v. Stern*, 127 Misc. 229, 215 N. Y. S. 537 (1925); *Stalban v. Friedman*, 11 N. Y. S. (2d) 343 (1939); *Stillwell Theatres Inc. v. Kaplan*, 259 N. Y. 405, 182 N. E. 63 (1932); *Wilner v. Bless*, 243 N. Y. 544, 154 N. E. 598 (1926).

In attempting to objectivize this inverted imputation, many judges have adopted the slippery concept of "degree of remoteness" as an external measuring rod.<sup>15</sup> When determining the motives which impel a union to seek the downfall and destruction of its rival, they have concluded that the remoteness of the benefits which would presumably flow from the consummation of the campaign—a stronger organization, and ultimately, improved conditions of work—prevents their disregarding the indubitably malicious act of destruction in which the union is immediately engaged.<sup>16</sup> Where to draw the line between immediate and remote purpose becomes a nice question when this approach is seriously contemplated. In practice, the usual procedure has been merely an arbitrary enumeration of those ends regarded either as too remote or not too remote. Some judges have regarded the entire proceeding with scepticism, and at once eliminated it as a relevant factor by agreeing with Justice Holmes that "The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests . . . unity of organization is necessary to make the contest of labor effectual, and . . . societies of laborers lawfully may employ in their preparation the means which they might use in the final contest."<sup>17</sup>

In practice, the quest for motive often degenerates into a question of the previous preconceptions of the seeker.<sup>18</sup> Serious belief that

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<sup>15</sup> The dubious psychological basis of this concept is similar in many respects to that upon which the "time-discount" theories of the American economists Fisher and Fetter are based, namely, that men are actuated more strongly by immediate prospects than by those more remote in time. It follows that the effective purpose, and therefore that to be taken into account, is the one which seeks to attain the immediate end.

<sup>16</sup> "The gain which a labor union may expect to derive from inducing others to join it is not an improvement to be obtained directly in the conditions under which the men are working, but only added strength for such contests with employers as may arise in the future. An object of this kind is too remote to be considered a benefit in business, such as to justify the infliction of intentional injury upon a third person for the purpose of obtaining it." *Berry v. Donovan*, 188 Mass. 354, 74 N. E. 603 (1905).

<sup>17</sup> *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011 (1900), dissenting opinion. Substantially similar language is employed in *Kemp v. Division* 241, 255 Ill. 213, 99 N. E. 389 (1912).

<sup>18</sup> "One of the results of the application of this test is that the reports are filled with cases in which the courts have decided strike cases in accordance with their personal economic and social predilections, and not upon the

the gossamer strands of human motive can be bared by hurried judicial inquiry has been characterized by the New York Court of Appeals as "illogical and little short of absurd."<sup>19</sup> This same court realistically eliminated the confusion resulting from the clothing of policy decision in the garments of an abstract traditionalism by flatly asserting that "whenever the courts can see that a refusal of members of an organization to work with non-members may be in the interest of the several members, it [sic] will not assume, in the absence of a finding to the contrary, that the object of such refusal was solely to gratify malice, and to inflict injury upon such non-members."<sup>20</sup>

### C. THE THEORY OF JUSTIFICATION

As has been intimated above, contemporary courts, in their consideration of dual unionism, are much concerned with finding justification for the various acts committed. Though often inextricably bound up with the rationale of malice, this approach can perhaps be distinguished by regarding it as an inquiry into the validity of the objective ends which conflicting groups seek to attain rather than as a search for psychological motivation. There is no attempt to go backward from act to motive; the act is accepted as a *fait accompli*, standing apart from its effective cause, and the important thing to be discovered is whether or not it was justified under the circumstances.

The quest for justification proceeds along the lines of a judicial balancing of conflicting rights, privileges and duties:

Whether a privilege of invasion exists depends upon whether it is of greater moment to society to protect the defendant in the invading activities than it is to protect and guard the plaintiff's interest from such invasions. An evaluation and balancing of the social import of the conflicting interests

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facts . . . . What may or may not be the motive or motives of the strikers is, in nearly all cases, a matter which borders on the nebulous. Unless the strikers expressly state what their motives are, a court must resort to conjecture, and this conjecture is usually based upon the results of the strikers' actions." Warm, *op. cit.* at n. 1, p. 265.

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<sup>19</sup> National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902). See also French Sardine Co. v. Deep Sea Fisherman's Union, 2 Labor Relations Reporter 840 (Cal. Super. 1938): "It is the nature of the act in question, not the motive back of it, that determines its lawfulness. Courts do not deal with metaphysical (sic) questions."

<sup>20</sup> National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902).

of the respective parties and of the social interests per se are involved. The defendant may be privileged to invade an interest of the plaintiff although it is not for the protection or furtherance of any interest of his own, if the invasion is in furtherance of a social interest of greater public import than is the social interest involved in the protection of the plaintiff's individual interest.<sup>21</sup>

Logical application of the theory involves a detailed appraisal of the benefits and injuries that will flow to union members, to the employer, and to the social organism, respectively, if a union is permitted to carry on activities aimed at the destruction of its rival. The weights to be assigned are "a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds . . . . When the question of policy is faced it will be seen to be one which cannot be answered by generalities, but must be determined by the particular character of the case."<sup>22</sup> As a necessary preliminary to the determination of the effects of trade union activities, judicial cognizance must be taken of such factors as the nature and type of the competing unions,<sup>23</sup> the wage scale under which each union is operating,<sup>24</sup> and the economic consequences, in full view of current governmental and business policy, of either granting or refusing to grant equitable relief.<sup>25</sup>

When applied in this fashion, realistic solutions may be reached under the aegis of the theory of justification. An advocate of it in this form, rallying to its support, queries:

Does not the answer to the perplexing problem of finding justification for picketing by rival unions lie in the determination by the courts of the relative merits of the competing unions? In other words is not the external and objective test of merit preferable to the internal test of bona fides [malice]?<sup>26</sup>

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<sup>21</sup> Carpenter, "Interference with Contract Relations," 41 *Harvard Law Review* 728 (1928).

<sup>22</sup> Holmes, "Privilege, Malice and Intent," 8 *Harvard Law Review* 1 (1895).

<sup>23</sup> *United Baker Workers v. Messing*, N. Y. L. J., Feb. 19, 1926, p. 2040; *Esco Operating Co. v. Kaplan*, 144 Misc. 646, 258 N. Y. S. 303 (1932).

<sup>24</sup> *De Agostina v. Holmden*, 157 Misc. 816, 285 N. Y. S. 909 (1935); *Fox v. Gold*, N. Y. L. J., Jan. 20, 1932; *Park Lane Baking Co. v. Christel*, N. Y. L. J., July 11, 1930, p. 1865; *Spinner v. Paolillo*, N. Y. L. J., May 26, 1939, p. 2442.

<sup>25</sup> *De Agostina v. Leff*, N. Y. L. J., Jan. 27, 1936, p. 480.

<sup>26</sup> "Picketing to Compel Substitution of One Union for Another," 21 *Cornell Law Quarterly* 640 (1936).

Actually, however, a different approach is adopted. Usually, the courts place into the balances a number of metaphysical notions having little if any connection with the facts of the controversy. Policy is fashioned less from empirical data than from generality. The technique employed involves the enumeration of certain "rights," which must prevail unless rebutted by demonstrating that certain superior "rights" provide justification for interference.<sup>27</sup> If justification is found, injury to a unionist or to an employer caught in the "cross-fire" of competing unions is *damnum absque injuria* and must be borne.<sup>28</sup>

As a prerequisite to arguing from these axiomatic principles, each judge must decide for himself the ranking of a whole series of rights, thus making the outcome largely dependent upon judicial preconception.<sup>29</sup> Professor Witte has shown how opposite conclusions can be drawn from similar premises through the use of this deductive logic.<sup>30</sup> Indeed, it is not uncommon for both majority and dissenting judges to agree on what may be described as "fundamentals" but to stand poles apart on their application.<sup>31</sup>

The very element that makes for instability, personal ranking of rights, imparts to the theory a certain flexibility that makes its use more plausible. Changing social needs, by modifying the underlying assumptions that mold conscious thought, cause constant restratification of rights. The *Exchange Bakery* case,<sup>32</sup> for example,

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<sup>27</sup> A recently published work undertakes to show the concrete importance of such illusory symbols as "rights." See Thurman W. Arnold, *The Folklore of Capitalism* (New Haven, 1937), chaps. i, ii, iii.

<sup>28</sup> *Beck v. Teamsters Protective Union*, 118 Mich. 516, 77 N. W. 13 (1898); *My Maryland Lodge v. Adt*, 100 Md. 249, 59 Atl. 721 (1905).

<sup>29</sup> "As in the case of the test of motives, so in considering the question of justification, a court is almost forced to interpret the social and economic views of the disputants in terms of its own social and economic views in order to arrive at its conclusion. While the test of justification is not as indefinite as the test of motive, nevertheless it leaves some doubt that the end result may not have been colored by the bias and prejudices of the court." Warm, *op. cit.* at n. 1, p. 266.

<sup>30</sup> Witte, *op. cit.* at n. 1, pp. 51-52.

<sup>31</sup> See, for example, *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902). Neither Chief Justice Parker, for the court, nor Justice Vann, in dissent, could have objected to specific portions of the other's opinion. The radically different tones of the opinions were due to dissimilar placing of emphasis and to a disagreement over the ranking of rights and privileges.

<sup>32</sup> *Exchange Bakery v. Rifkin*, 245 N. Y. 260 (1927).

recognized as justification for picketing an objective which a few decades before could scarcely have been considered legitimate, namely, the extension of trade union organization to an entire industry.<sup>33</sup> This suggests that the employment of the justification doctrine as a methodological frame-work within which the facts may be organized, graded, and sifted, rather than as a tight system of *a priori* logic, might conceivably be of assistance to the conscientious judge.

#### D. ILLEGAL MEANS

Many courts, hesitant to wander into realms of philosophical speculation, have taken refuge in a more substantial inquiry, namely, the ascertainment of the legality or illegality of the means employed in carrying on labor disputes. The subjective factor of judicial preconception is not eliminated, however, by this mode of procedure. Allegations contained in affidavits and testimony are notoriously conflicting<sup>34</sup> and offer ample scope for either finding or rejecting unlawfulness. To add to the difficulty of objective determination, the very concept of illegality is shrouded in mists of uncertainty, acts clearly legal in one jurisdiction being just as clearly illegal in others,<sup>35</sup> with a wealth of precedent on either side. Not uncommonly, judges within the same jurisdiction disagree as to the propriety of identical acts.<sup>36</sup>

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<sup>33</sup> *Idem*: "Economic organization today is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory but generally."

<sup>34</sup> Frankfurter and Greene, *op. cit.* at n. 1, pp. 66-81.

<sup>35</sup> "The reported cases vary widely in their definitions as to what constitutes an unlawful act, as to when an unlawful act becomes inconsistent with the rights of others, and as to what constitutes coercion and intimidation. Here again the courts fall into the error of using vague and indefinite terms. In fact, this very indefiniteness has brought about a situation in which every labor dispute is an experiment in method which may or may not meet the approval of the court." Warm, *op. cit.* at n. 1, p. 268.

<sup>36</sup> In *Carnation Photoplay Co. v. Basson*, N. Y. L. J., Dec. 29, 1925, p. 1264, it was found that a union, in picketing an establishment which employed rival union men, carried signs stating: "*This Theatre Does Not Employ Motion Picture Operators Members of Local 306 Who Are Affiliated With the American Federation of Labor.*" Justice Lewis of the New York Supreme Court, in upholding the right of the union to employ such signs, stated: "Certainly the defendants would have a right to state what they have printed on their signs . . . I can find no case which enjoins the right to freely utter and publish that which is the truth." This decision was reversed

A trade union engaged in fighting a rival is particularly vulnerable to the charge that it has employed illegal means. Judges only recently converted to the belief that trade unions have a legitimate place in the economic hierarchy can generally be expected to have but little patience with the disruption of employer's business<sup>37</sup> attendant upon the efforts of one union to oust another, and disposed to seize upon the ever present allegations of violence as the basis for issuing restraining orders.<sup>38</sup> Moreover, an element of coercion is generally to be found as an overt fact in rival union cases, since articulate rival groups more credibly air their grievances through the submission of affidavits in their own behalf than does an employer in behalf of perennially persecuted non-union workers. Consequently it is not surprising to find that in a large proportion of dual union cases illegal means should have served as the principal basis for the grant of injunctive relief.

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upon the facts by the Appellate Division, 216 A. D. 769 (1926), and the signs prohibited.

In *Edjomac Amusement Corp. v. Empire State Union*, 156 Misc. 856, 283 N. Y. S. 6 (1935) a union, picketing its rival as in the *Carnation* case, displayed the following legend: "*Don't Patronize This Theatre. It Does Not Employ Members of the Empire State Theatrical Stage Employees Union, Inc.*" Justice Rosenman, also of the New York Supreme Court, held: "The signs are accurate so far as the letter of truth is concerned. Their implication, however, is untruthful. They represent, and are intended to represent to passersby that the employer refuses to employ union help . . . . That natural impression is not in accord with the facts." This judgment was reversed by the Court of Appeals, 273 N. Y. 647, 8 N. E. (2d) 329 (1937).

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<sup>37</sup> "The dilemma of plaintiff presents the striking feature of a legitimate business, involving the investment of a considerable sum, becoming a grain between the upper and nether millstones of clashing, contesting and conflicting trades unions unless the might of the law arrests . . . the effect of the melee in which the plaintiff can but have impersonal interest. Common sense and common justice . . . demand that the innocent business man be not needlessly burdened with the hazard of having his business interrupted, if not destroyed, because of war between organizations having different ideals of the ideal state of labor, especially if the conflict is waged principally for control and not for the collective and, more particularly, the individual benefit of those who are employed in the trade." *Park Lane Baking Co. v. Christel*, N. Y. L. J., July 11, 1930, p. 1865.

<sup>38</sup> But see *Reform Club of Masons and Plasterers v. Laborers Union Protective Society*, 60 N. Y. S. 388 (1899), in which attempts by defendant to secure the discharge of plaintiffs were not enjoined for the express reason that the court failed to find the use of illegal means. Also, *Public Baking Co. v. Stern*, 127 Misc. 229, 215 N. Y. S. 537 (1925); *N. & R. Theatres v. Basson*, 127 Misc. 271, 215 N. Y. S. 157 (1925).

E. INDUCING BREACH OF CONTRACT AND ENFORCEMENT OF  
COLLECTIVE AGREEMENTS

Unions seeking to establish themselves have often encountered a well-nigh insuperable obstacle in a comparatively recent legal theory,<sup>39</sup> the doctrine of inducing breach of contract. Of overwhelming importance in the present era of employment stabilization through collective labor agreements,<sup>40</sup> a proper exposition of its significance for the problems of rival unionism involves a brief description as well as a consideration of its present status.

Elements essential to establish liability for inducing breach of contract are at least nine<sup>41</sup> in number: the existence of a contract must be proved; the contract must be a valid one; it must be legally enforceable;<sup>42</sup> intention to bring about the particular result must be demonstrated; knowledge of the contract by the breacher is essential; the presence of malice is necessary;<sup>43</sup> defendant must be shown

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<sup>39</sup> It was first enunciated in *Lumley v. Gye*, 2 E & B 215 (1853). "From England the doctrine has emigrated to the United States, and although some states squarely reject it, the majority accept it as binding law." W. Sayre, "Inducing Breach of Contract," 36 *Harvard Law Review* 663 (1923). See also "Actions Against Labor Unions for Inducing Breach of Contract," 32 *Illinois Law Review* 611 (1938).

<sup>40</sup> Accurate recent figures on the number of men working under collective agreements are lacking. However, specimen agreements, collected by the Bureau of Labor Statistics, may be found in almost any issue of the *Monthly Labor Review*. See also Bureau of Labor Statistics Bulletin No. 541, pp. 399-403. The National Industrial Conference Board, in *Individual and Collective Bargaining Under the N. I. R. A.* (New York, 1933), estimated that in 1933, 50% of the workers in the clothing industry, 21% in printing, 19% in stone, clay and glass products, 18% in textiles, and 89% of the workers in coal mining dealt with their employers through labor unions. Great strides have been made since 1935 in those industries, as well as in automobiles and steel, through the organizing efforts of the Congress of Industrial Organizations. A recent study of the extent of collective agreements by David J. Saposs and Sara Gamm, 4 *Labor Relations Reporter* 546 (1939), confirms this statement.

<sup>41</sup> "Procuring Breach of Contract," 84 *American Law Reports* 43 (1933); Edwin S. Oakes, *Organized Labor and Industrial Conflict* (Rochester, 1927), p. 767.

<sup>42</sup> "An injunction will not issue to prevent the breach of a contract which is for any reason unenforceable, as where the contract is against public policy." 32 *Corpus Juris* 189. This rule is of great importance where, by statutory enactment, collective agreements with company unions have either directly or impliedly been declared to be against public policy.

<sup>43</sup> "Malice in some form is generally implied from the act of interference with contract relations, and is declared to be an essential ingredient in such cases." 84 *American Law Reports* 43 (1933). Malice at law, it should be noted, may simply follow from lack of justification.

to be the moving cause of the breach;<sup>44</sup> damage must have resulted; and finally, the means used must have been unlawful. Mere coexistence of these elements in a particular action, however, does not necessarily entitle plaintiff to relief. Presumption of liability may be rebutted by a showing of justification, or of legality of the means employed.<sup>45</sup> Also, it is necessary to differentiate "the cases where the defendant acts for the specific purpose or with desire of invading, or knows that the end he seeks to accomplish in itself constitutes an invasion of the plaintiff's contract interest, from the cases where the act is done for a purpose other than a desire to invade, although an invasion incidentally and indirectly results from the act done."<sup>46</sup>

The earliest application of this doctrine to labor disputes resulted from the efforts of employers or individual workers to restrain unions from interfering with individual contracts at will<sup>47</sup> or for fixed terms.<sup>48</sup> The *Hitchman* case greatly extended its scope by bringing the "yellow-dog" contract under its protection.<sup>49</sup> With

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<sup>44</sup> But "it is not necessary that a breach of contract should have already occurred in order to obtain an injunction, since threatened breaches may be enjoined if there is good ground for fearing their commission by defendant." 32 *Corpus Juris* 191.

<sup>45</sup> In this connection, the following note is interesting: "Where the means used lie in persuasion only, exercised under circumstances in which it does not amount to intimidation, unanimity of opinion ceases. In England, and in most of the states, persuasion exercised with the intention of inducing a breach of contract is actionable, in the absence of sufficient justification . . . . The rule that persuasion inducing the breach of a contract is actionable is not universally held, however." 84 *American Law Reports* 43 (1933).

<sup>46</sup> Carpenter, *op. cit.* at n. 21.

<sup>47</sup> The courts differ as to whether an employee without a contract for a definite term may enjoin interference with his employment by a labor union when that interference takes the form of a strike or a threat to strike unless he is discharged. See Witte, *op. cit.* at n. 1, p. 26; Warm, *op. cit.* at n. 1, p. 258 footnote 7. The language of Justice Hughes in *Truax v. Raich*, 239 U. S. 33 (1915) is instructive: "The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others . . . and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will."

<sup>48</sup> "Opinion as to the legality of this conduct is divided." Frankfurter and Greene, *op. cit.* at n. 1, p. 37. In Ohio, it is well settled that contracts for a definite term will be protected. 24 *Ohio Jurisprudence* 648.

<sup>49</sup> *Hitchman Coal and Coke Co. v. Mitchell*, 245 U. S. 229 (1917). Informative and critical material is contained in Frankfurter and Greene, *op. cit.* at n. 1, pp. 37-42, 148-149; Witte, *op. cit.* at n. 1, pp. 220-230; Warm, *op. cit.* at n. 1, p. 259 footnote 8; Oakes, *op. cit.* at n. 41, pp. 142-143;

the recognition by the courts of the growing importance of collective labor agreements,<sup>50</sup> enforceable by either party,<sup>51</sup> new vigor has been infused into the concept of inducing a breach of contract.

Whether in the name of "usage,"<sup>52</sup> "third party beneficiary,"<sup>53</sup>

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"Unionizing Employees," 26 *American Law Reports* 158 (1923); Carey and Oliphant, "Present Status of the Hitchman Case," 29 *Columbia Law Review* 441 (1929); James Landis, *Cases on Labor Law* (Chicago, 1934), p. 129 note 9. This application of the doctrine seems to have been laid to rest by the provisions of Section 3 of the Norris-La Guardia Act, by the several state anti-injunction acts modeled upon the Norris Act, and by Section 8 (3) of the National Labor Relations Act. The New York Court of Appeals rejected the Hitchman reasoning even before the statutory enactment in *I. R. T. v. Lavin*, 247 N. Y. 65, 159 N. E. 863 (1928) and *Stillwell Theatre v. Kaplan*, 259 N. Y. 405, 182 N. E. 63 (1932), but it has been followed quite recently by the high court of the State of Pennsylvania in *Kraemer Hosiery Co. v. American Federation of Full Fashioned Hosiery Workers*, 305 Pa. 206, 157 Atl. 588 (1931).

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<sup>50</sup> A recent flood of periodical literature on the legal aspects of the collective labor contract gives some clue to the increasing recognition. See W. G. Rice, "The Collective Labor Agreement," 44 *Harvard Law Review* 572 (1930); Christenson, "Legally Enforceable Interests in American Labor Union Working Agreements," 9 *Indiana Law Journal* 69 (1933); "Collective Labor Agreements," 31 *Columbia Law Review* 1156 (1931); "Theories of Enforcement of Collective Labor Agreements," 41 *Yale Law Journal* 1221 (1932); "Collective Labor Agreements," 95 *American Law Reports* 10 (1935); Anderson, "Collective Bargaining Agreements," 15 *Oregon Law Review* 229 (1936); "Present Status of Collective Labor Agreements," 51 *Harvard Law Review* 520 (1938); T. Richard Witmer, "Collective Labor Agreements in the Courts," 48 *Yale Law Journal* 195 (1939).

<sup>51</sup> *Schlesinger v. Quinto*, 201 A. D. 487, 194 N. Y. S. 401 (1922) was the first reported decision in which a union was held entitled to specific performance of a collective labor agreement. In the same year a similar action was granted by an Ohio court, *Leveranz v. Home Brewing Co.* 24 Ohio N. P. N. S. 193 (1922). Witmer, *op. cit.* at n. 50, cites 15 suits by unions to enforce collective agreements in the lower courts of New York (footnote 19), and numerous attempts in other jurisdictions (footnotes 20-26).

<sup>52</sup> Usage has been defined as "an established method of dealing, adopted in a particular place, or by those engaged in a particular vocation or trade, which acquires legal force because people make contracts in reference to it." *Byrd v. Beall*, 150 Ala. 122, 43 So. 749 (1907). Professor Rice has concluded that, viewed in this light, collective labor agreements constitute "binding terms of the individual's employment." Rice, *op. cit.* at n. 50. Professor Christenson, however, differs from Rice in maintaining that "the trade union working agreement creates no legal rights or obligations so far as individual union members are concerned. Legal interests arise only when individuals adopt the terms of the trade agreement as part of their contracts of employment." Christenson, *op. cit.* at n. 50. Usage "leaves unanswered the problems of how the provisions of the collective agreements are to be given effect between the collective parties." Anderson, *op. cit.* at n. 50.

<sup>53</sup> "The theory is that the union made a valid contract with the employer to benefit directly the individual employee, thereby entitling him to

"agency,"<sup>54</sup> or contract proper,<sup>55</sup> a collective labor agreement will generally receive specific protection and enforcement in a court of equity. This development, in conjunction with either the willingness or unwillingness of courts to enjoin attempts to procure contract breaches, has created situations embarrassing to all parties concerned. Employers, honestly negotiating collective agreements with those whom they, in good faith, believed to be the representatives of their employees, have found themselves in the unenviable predicament<sup>56</sup> of being subjected to picketing and other coercive activity by

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sue and claim its benefits." Anderson, *op. cit.* at n. 50. First applied in *Gulla v. Barton*, 164 A. D. 293, 149 N. Y. S. 952 (1914), this theory has had a rather widespread acceptance. See *Yazoo v. Sideboard*, 133 So. 669 (Miss. 1931); *Rentschler v. Missouri Pac. R. R.*, 126 Neb. 493, 253 N. W. 694 (1934); *H. Blum and Co. v. Landau*, 23 Ohio App. 426, 155 N. E. 154 (1926); *Fryns v. Fair Lawn Fur Dressing Co.*, 114 N. J. Eq. 462, 168 Atl. 862 (1933); *McCoy v. St. Joseph Belt Rwy. Co.*, 77 S. W. (2d) 175 (Mo. 1934); *Youmans v. Charleston & N. Car. Rwy.*, 175 S. C. 99, 178 S. E. 671 (1935); *Dierschow v. West Suburban Dairies, Inc.*, 276 Ill. App. 355 (1934); *Volquaisden v. Southern Amusement Co.*, 156 So. 678 (La. 1934).

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<sup>54</sup> General principles of commercial agency are taken over. Among the pioneering cases were *Maisel v. Sigman*, 205 N. Y. S. 807 (1924); *Meltzer v. Kaminer*, 131 Misc. 813, 227 N. Y. S. 459 (1927); *Piercy v. Louisville R. R.*, 198 Ky. 477, 248 S. W. 1042 (1923).

<sup>55</sup> The most recent tendency has been to recognize collective agreements as valid and subsisting two party contracts, having mutuality and adequate consideration. New York has again taken the lead in expounding this view. *Schlesinger v. Quinto*, 201 A. D. 487, 194 N. Y. S. 401 (1922); *Meltzer v. Kaminer*, 131 Misc. 813, 227 N. Y. S. 459 (1927). Professor Anderson, *op. cit.* at n. 50, questions the possibility of "attempting application of two-party contract rules with the rights and duties flowing therefrom . . . to a social situation involving multiple party relationships" and cites the need for "a new set of substantive legal rules to define these practices and formulate them into a workable system of jurisprudence to cope with this social situation." See also *Witmer, op. cit.* at n. 50, for similar criticism. A notator at 41 *Yale Law Journal* 1221 (1932) disagrees, however, and suggests that "the most effective legal formula capable of contemporary use in the enforcement of collective agreements would be treatment of the agreement as a valid contract between the employer and the union."

<sup>56</sup> The dire plight of employers has been set forth in lyrical phrases. Justice Schmuck's opinion in *Park Lane Baking Co. v. Christel*, N. Y. L. J., July 11, 1930, p. 1865, in which he referred to the employer as "a grain between the upper and nether millstones of clashing, contesting and conflicting trades-unions" has been used repeatedly. Justice Hammer, in *De Agostina v. Leff*, N. Y. L. J., Jan. 27, 1936, p. 480, has described the employer as standing in the "cross-fire" of two unions, while Justice Steinbrink pictures him as facing the dilemma of Scylla or Charybdis, and observes: "Neither an Adam Smith nor a preacher of social justice can solve a problem such as this." No, "It requires something more than the wisdom of a Solomon." *Bacinski v. Douglass*, N. Y. L. J., Nov. 30, 1937.

members of unions rival to that with which they had contracted, yet unable to yield<sup>57</sup> to the demands of the pickets owing to the probability that the contracting unions could secure specific performance of the original agreements through equitable order. Labor unions, on the other hand, have discovered that two of their most cherished aims, the unrestricted use of the weapon of picketing in labor disputes and the recognition of collective agreements as contracts, have come into conflict.<sup>58</sup> Organizations holding collective agreements are most vehement in denouncing the attempts of rivals to induce the employers to breach these contracts, yet just as vociferously proclaim their absolute right to use methods employed for the specific purpose of procuring the abrogation of similar agreements held by these same rivals.<sup>59</sup>

The language and spirit of inducing breach of contract have been relied upon repeatedly<sup>60</sup> to extricate the courts from these difficult

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<sup>57</sup> "Considered in conjunction with this principle [of enjoining breach of a contract], the decision places the employer in a dilemma—he cannot restrain the pickets, yet he will not be permitted to yield to them." "Rival Unions," 46 *Harvard Law Review* 125 (1932).

<sup>58</sup> "Picketing to Compel Substitution of One Union for Another," 21 *Cornell Law Quarterly* 640 (1936); "Rival Unions," 46 *Harvard Law Review* 125 (1932), note 29.

<sup>59</sup> Compare *Aberon v. Raimist*, 254 N. Y. S. 38 (1931) with *Adler v. Aumiller*, N. Y. L. J., April 24, 1934, p. 1975. In the former, the Amalgamated Food Workers Union had signed a contract with the plaintiff, and joined in a plea to inhibit the coercive activities of a perennial rival, the Bakery and Confectionery Workers Union. In the latter, the roles were reversed, the Bakery and Confectionary Workers having secured the contract and complaining of picketing by the Amalgamated Union.

<sup>60</sup> *Central Metal Products Corp. v. O'Brien*, 278 Fed. 827 (1922); *Goyette v. Watson*, 245 Mass. 577, 140 N. E. 285 (1923); *Preble v. Architectural Iron Workers Union*, 260 Ill. App. 435 (1931); *Tracey v. Osborne*, 226 Mass. 25, 114 N. E. 959 (1917); *Baum v. Field*, N. Y. County Clerk Index 3105 (1934); *Brooklyn United Theatre v. Local 306*, Kings County Clerk Index 21662 (1928); *Esco Operating Corp. v. Kaplan*, 144 Misc. 646, 258 N. Y. S. 303 (1932); *Fox v. Gold*, N. Y. County Clerk Index 39400 (1931); *Probolsky v. Rubinberg*, Kings County Clerk Index 3900 (1923); *Public Baking Co. v. Stern*, N. Y. County Clerk Index 40723 (1925); *Somerspitz v. Fleisher*, N. Y. L. J., April 16, 1924, p. 234; *Stillwell Theatre v. Kaplan*, 249 N. Y. S. 122, 235 A. D. 738, *rev.* 259 N. Y. 405 (1932); *Wolchak v. Wiseman*, 145 Misc. 268, 259 N. Y. S. 225 (1932); *Michaels v. Hillman*, 111 Misc. 284, 181 N. Y. S. 165 (1920); *Frankel Chevrolet v. Meerchaum*, 27 Ohio Law Abstract 425 (1938); *Hotel and Restaurant Union v. Miller*, 272 Ky. 466, 114 S. W. (2d) 501 (1938); *Murphy v. Practical Bookbinding Co.*, New York County Clerk Index 12300 (1938); *Spinner v. Paolillo*, N. Y. L. J., May 26, 1939, p. 2442.

situations. A recent opinion of Justice Cotillo of the New York Supreme Court in a case involving rival union picketing is typical:

. . . back of the instant picketing is the determined plan to crush the plaintiff's entire economic establishment and wipe out her financial investment, unless she performs the required illegal act of breaking her contract with the American Labor Alliance. By no other choice can she buy her peace or salvation. *To act lawfully is to succumb. To act unlawfully is to succeed* . . . . This is the type of case which calls for the court's exercise of its equitable powers by a wise discretion and acting to prevent a manifest wrong.<sup>61</sup>

Additional complications are presented when the collective agreement contains as one of its terms a provision for the closed shop. Courts are divided on the legality of this clause,<sup>62</sup> and not all courts will enforce such an agreement,<sup>63</sup> but where the closed shop is not illegal per se, new problems arise. Have the members of a union rival to the contracting one any recourse if they are discharged in pursuance of the terms of a closed shop agreement?<sup>64</sup> May a trade union carry on a peaceful campaign to procure a closed shop, although incidental discharge of non-members will result from its victory?<sup>65</sup> May a trade union use a court of equity to induce the

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<sup>61</sup> *Stalban v. Freedman*, 11 N. Y. S. (2d) 343 (1939).

<sup>62</sup> Commons and Andrews, *Principles of Labor Legislation* (New York, 1936 ed.), pp. 391-393; Warm, *op. cit.* at n. 1, pp. 287-295.

<sup>63</sup> Some courts base their refusal on the ground that the closed shop tends to create a labor monopoly within a community, when such a contingency appears possible under the circumstances. Oakes, *op. cit.* at n. 41, pp. 238, 392. It is not generally void, however, merely on the ground that it is contrary to public policy. See 95 *American Law Reports* 10 (1935); "Validity of Agreements to Employ Union Labor Exclusively," 3 *Temple Law Review* 421 (1929).

<sup>64</sup> As far as non-union men are concerned, the courts have generally answered this in the negative: *Shinsky v. O'Neill*, 121 N. E. 790 (Mass. 1919); *Reihing v. Local 52*, 109 Atl. 367 (N. J. 1920); *Harmon v. United Mine Workers*, 266 S. W. 84 (Ark. 1924); *Cusumano v. Schlessinger*, 152 N. Y. S. 1081 (1915); *Mills v. U. S. Printing Co.*, 99 A. D. 605, 91 N. Y. S. 185 (1904); *contra*: *Sutton v. Workmeister*, 164 Ill. App. 105 (1911).

<sup>65</sup> The answer to this question is often made to turn upon the legitimacy of the purpose. It has been answered in the affirmative in *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 (1906); *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902); *Reform Club v. Laborers Union*, 60 N. Y. S. 388 (1899); *Stone Cleaning and Pointing Union v. Russell*, 38 Misc. 513, 77 N. Y. S. 1049 (1902); *Williams v. Quill*, 277 N. Y. 1, 12 N. E. (2d) 547 (1938), and in the negative in *Chicago Federation of Musicians v. American Musicians Union*, 139 Ill. App. 65 (1908); *Goyette v. Watson*, 245 Mass. 577, 140 N. E. 285 (1923); *Bogni v. Perotti*,

breach of a closed shop agreement held by a rival,<sup>66</sup> particularly when the contractor closes its rolls to additional members? Equitable enforcement of a closed shop contract with a union other than that to which current employees adhered, necessitating the discharge of the employees,<sup>67</sup> represented a solution to another particularly pressing problem. In the light of these and similar questions, the assertion previously made as to the importance for contemporary legal thought of the theories pertaining to enforcement of and inducing breach of contract is scarcely overemphasized.<sup>68</sup>

#### F. THE DOGMA OF FREE COMPETITION

So thoroughly impregnated has our ideology become with the catchwords of a bygone *laissez-faire* economy that the courts, on occasion, have resorted to these symbolic souvenirs in order to justify a refusal to restrict rival union warfare. Hardships incidental to the battle for control are not minimized, "but in spite of such

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224 Mass. 152, 112 N. E. 853 (1916); *Fairbanks v. McDonald*, 219 Mass. 291, 106 N. E. 1000 (1914). See Oakes, *op. cit.* at n. 41, pp. 392-398, and Warm, *op. cit.* at n. 1, pp. 291-292, footnotes 89, 90, 91, for long lists of similar cases.

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<sup>66</sup> An early case, *House Painters Beneficial Association v. Feeny*, 13 Pa. Dist. Rep. 335 (1904), held that it might, reasoning as follows: "Obviously, if all persons who join the plaintiff are prevented from securing work on that account, no one could become a member, and the [union] would therefore cease to enjoy the rights which its charter gives to it." This decision was rendered, however, in the light of an attempt to exclude plaintiff's members from employment in the community generally.

A better considered rule, denying relief, was enunciated in *Hoban v. Dempsey*, 217 Mass. 166, 104 N. E. 717 (1914).

<sup>67</sup> *De Agostina v. Parkshire Ridge Amusement Co. Inc.*, 93 N. Y. L. J. 603 (1934). *Contra*, *Murphy v. Practical Bookbinding Co.*, N. Y. County Clerk Index 12300 (1938).

<sup>68</sup> Some additional problems suggested by contemporary events might be phrased as follows: What is the legal significance of the ability of a union to "freeze-out" a rival and inhibit its activities, which might have proven beneficial to the workers, by securing closed shop contracts (this is particularly important when racketeers capture the "in" group)? What is to be done in the event that an employer frustrates the efforts of a union which he regards as undesirable by signing a closed shop agreement with a bona fide rival union which is more amenable to persuasion? The courts have not yet attacked these questions in a realistic manner. The National Labor Relations Board is beginning to do so. See *infra*, ch. xi.

evils competition is necessary to the welfare of the community."<sup>69</sup> Activities "within the allowable area of economic conflict" must be tolerated, for interference, in the words of the New York Court of Appeals, "might strike a death blow to legitimate labor activities."<sup>70</sup> The difficulties encountered in defining the "allowable area"<sup>71</sup> and the growing magnitude of the clashing interests involved may help convince the courts that formulae more intrinsically related to rival unionism than is the borrowed concept of free competition are necessary. With labor's traditional distrust of the courts overcome by the desire to invoke their aid against rivals, resulting in an increase in the number of rival union actions, it seems hardly likely that the courts will be able to escape being drawn in by calling upon the shade of an irrelevant<sup>72</sup> dogma.

### G. ABSOLUTE RIGHTS

This theory, a corollary of the principle of justification, that all citizens have certain inalienable rights, has played, superficially, a surprisingly extensive role in the adjudication of rival union disputes. Recognition of the right possessed by laborers to refuse to work with members of other organizations<sup>73</sup> has led courts to con-

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<sup>69</sup> *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 (1906). "Although there is conflict in the decisions, it appears that where the motive of the union in securing the discharge of a non-union worker is to obtain more employment for union members, the union may justify its action on the ground of competition." Note, 32 *Illinois Law Review* 611 (1938).

<sup>70</sup> *Stillwell Theatre v. Kaplan*, 259 N. Y. 405, 182 N. E. 63 (1927).

<sup>71</sup> *Frankfurter and Greene, op. cit.* at n. 1, pp. 1-46. Many courts have by definition so restricted the economic arena as to leave the gladiators little room for combat.

<sup>72</sup> That human labor is not a commodity to be subjected to the vagaries of competition in the market has become axiomatic. From this premise it follows that competition between labor unions is not to be compared with competition between merchants.

<sup>73</sup> *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327 (1903); *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663 (1901); *Davis v. United Engineers*, 51 N. Y. S. 180 (1898); *Kemp v. Division 241*, 255 Ill. 213, 99 N. E. 389 (1912); *Saulsberry v. Coopers International Union*, 147 Ky. 170, 143 S. W. 1018 (1912); *Carter v. Oster*, 112 S. W. 995 (Mo. 1908).

Much contemporary reasoning on this subject springs from the early English case of *Allen v. Flood*, App. Cas. 1 (1898), in which Lord Watson said: "It is, in my opinion, the absolute right of every workman to exercise his own option with regard to the person in whose society he will agree or continue to work. It may be deplorable that feelings of rivalry between dif-

done, in the absence of malicious purpose, efforts to oust a rival by offering an employer the alternative of discharging the members of the rival or dispensing with the services of the members of the acting union.<sup>74</sup> On the other hand, protection of the right to acquire property, which includes the right to work,<sup>75</sup> has been held to justify equitable restraint of interference with the employment of rival union men.<sup>76</sup> That these rights, and others,<sup>77</sup> are neither inalienable nor absolute has been pointed out by Professor Commons.<sup>78</sup> Their continued acceptance as such by the courts must be viewed as merely another mode of rationalizing prejudice.<sup>79</sup>

The legal theories discussed in the preceding section have been presented for what they are, the carriers of expressed reactions of

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ferent associations of workmen should ever run so high as to make members of one union seriously object to continue their labor in company with members of another trade union, but as long as they commit no legal wrong, and use no means which are illegal, they are at perfect liberty to act upon their own views."

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<sup>74</sup> *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902); *Graves v. McNulty*, 13 Ohio N. P. N. S. 110 (1912); *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 (1906).

<sup>75</sup> *Smith Metropolitan Market v. Lyons*, C. C. H. par. 18,026 (Cal. Super. 1937); *Erdman v. Mitchell*, 207 Pa. 79 (1903); *Swing v. American Federation of Labor*, 18 N. E. (2d) 258 (Ill. 1939); *Meadowmoor Dairies v. Milk Wagon Drivers Union*, 21 N. E. (2d) 308 (Ill. 1939).

<sup>76</sup> *Branson v. Industrial Workers of the World*, 95 Pac. 354 (Nev. 1908); *Mische v. Kaminski*, 127 Pa. 66, 193 Atl. 410 (1937).

<sup>77</sup> The right to picket peacefully was recently declared absolute by a state court. *Kirmse v. Adler*, 311 Pa. 78, 166 Atl. 566 (1933).

<sup>78</sup> Commons and Andrews, *op. cit.* at n. 62, pp. 506-509.

<sup>79</sup> The recent case of *Mitnick v. Furniture Workers Union*, 200 Atl. 553 (N. J. 1938) is interesting in this respect. Vice-Chancellor Berry there held that while free speech was a mere Constitutional privilege, the right to hold property was absolute and inherent, preceding government, and therefore entitled to precedence over any right merely declared by the Constitution.

Warm, *op. cit.* at n. 1, writes of these notions: "Nowhere with the possible exception of the field of constitutional law, do we find such a widespread use of metaphysical doctrines of inalienable and natural rights as in the law of labor relations . . . . These metaphysical doctrines have been erected into effective safeguards for the protection of property as against the social and economic claims of the worker . . . . It is no exaggeration to assert that they deal with a world of abstractions and make believe. The arguments which are based upon them lack substance, they are mere images of a shadow existence." See also the cases cited by Warm at p. 332, footnote 174 and p. 334, footnote 179.

judges to particular sets of facts. To appreciate the significance of these reactions, and to evaluate them as guides for future reference, one must turn to an examination of the raw materials constituting specific cases. As Dr. Witte has remarked, "What is needed is an examination of the facts and a study of how the law is actually working out, rather than *a priori* reasoning, nice deductions, and reversion to old doctrines and phrases."<sup>80</sup> The following chapters constitute an attempt to fulfill this requirement.

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<sup>80</sup> Witte, *op. cit.* at n. 1, p. 60.

## THE COMMON LAW OF RIVAL UNIONISM IN NEW YORK STATE

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In treating the decisions of the courts of the State of New York apart from those of courts of other jurisdictions, a concession has been made to the material and facilities available. The amount of research required to unearth unreported labor injunction suits even in one jurisdiction is almost prohibitive.<sup>1</sup> There is some justification, however, on less utilitarian grounds. Professor Brissenden has estimated that between 1875 and 1932 no less than 744 actions for labor injunctions arose in the New York Supreme Court<sup>2</sup> as compared with not less than an approximate 2,500 from all state and federal courts.<sup>3</sup> The New York cases—roughly 30 percent of the total—thus constitute a fair sized sample. It is likely, too, that this percentage would be much higher if only those cases in which the primary issue was rivalry between unions were included. New York City, one of the chief centers of political radicalism in the United States, has witnessed the growth and decline of innumerable small independent union movements, fostered by ideological cliques attempting to translate theory into practice.<sup>4</sup> Among two trade groups in particular, the motion picture machine operators and the bakery workers, sporadic rivalry has prevailed,<sup>5</sup> with resort to the

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<sup>1</sup> See the statements of Professor Jay Finlay Christ, whose work on Federal injunction suits has appeared in a number of issues of the *University of Chicago Journal of Business*, beginning with the April 1930 issue. Also, Frankfurter and Greene, *The Labor Injunction* (New York, 1932), p. 49, footnote 8; "Survey of Ohio Practice in Issuance of Labor Injunctions," 5 *Law Journal of Ohio State University* 289 (1939).

<sup>2</sup> P. F. Brissenden, "Campaign Against the Labor Injunction," 23 *American Economic Review* 42 (1933).

<sup>3</sup> P. F. Brissenden, "The Labor Injunction," 48 *Political Science Quarterly* 413 (1933).

<sup>4</sup> David J. Saposs, *Left Wing Unionism* (New York, 1926), *passim*.

<sup>5</sup> There have been at least five motion picture machine operators unions in the field since 1920. The largest and most stable is Local 306, Motion Picture Machine Operators Union, affiliated with the International Alliance of Theatrical and Stage Employees, A. F. of L., and claiming some 2,000 members in 1934. The Empire State Motion Picture Operators Union, Inc.,

courts a common practice. Finally, the reams of commentary and the great number of the citations which have greeted the appearance of a New York decision, the case of *Stillwell Theatre v. Kaplan*,<sup>6</sup> give ample evidence of great interest in the views of the New York Court of Appeals on the subject. It is possible, therefore, that a survey of the New York material will be of more than academic interest to those interested in the law of other jurisdictions.<sup>7</sup>

The New York courts have been unmistakably willing to intervene in some way in rival union disputes.<sup>8</sup> Out of a total of 101<sup>9</sup>

still in existence, had a membership of 210 in 1930. The Allied Motion Picture Operators Union, a small group formed in 1933, merged with Local 306 in 1937. The United Projectionists Union of Greater New York, concerning which little information is available, functioned for a short period beginning in 1922. Another small group, the Brotherhood of Motion Picture Projectionists, ceased to exist in 1932.

In the baking industry the only remaining union is the Bakery and Confectionery Workers International Union, affiliated with the A. F. of L., which recently united with a perennial rival, the Amalgamated Food Workers Union. Two other groups, the Journeymen Bakers and Confectioners International Union of America (1921-1923) and the United Baker Workers Union of America, Inc. (1923-1926), lived shortly but violently, while divisions of the Food Workers Industrial Union, affiliated with the late Trade Union Unity League, made a slight impression around 1930.

<sup>6</sup> 259 N. Y. 405, 182 N. E. 63, 84 A. L. R. 6 (1932).

<sup>7</sup> The emphasis throughout will be on the substantive rather than upon the procedural aspects of the material. Some statistical data have been included to illustrate policy. The important matter of the *ex parte* restraining order has been eliminated, inasmuch as characteristically there is involved in these no judicial commentary upon the law. For this and similar information the reader is referred to such procedural studies as Brissenden and Swayzee, "The Use of the Labor Injunction in the New York Needle Trades," 44 *Political Science Quarterly* 548 (1929), and 45 *Political Science Quarterly* 87 (1930); Anna Berger, "Use of the Labor Injunction Against the New York Bakery Workers"; Charlotte Raybin, "Use of the Labor Injunction Against the New York Fur Workers"; G. E. Wright, "The Labor Injunction in the Window Cleaning Industry." All of the latter are unpublished manuscripts in the Columbia University Library.

No attempt has been made to include those features of restraining orders which are not in some way peculiar to the issue of rival unionism. It may be remarked, however, that the general restraining clauses in the cases listed in the Appendices hereto differ but little from those analyzed in the sources listed immediately above.

<sup>8</sup> Misconception on this score is common. Witness: "In the cases in which the real controversy is . . . between competing groups of employees who seek by pressure upon the employer to compel him to favor one group over the other, the courts are surprisingly averse to judicial interference." Bernard Eskin, "'Peaceful Coercion' in Labor Disputes," 85 *University of*

rival labor union injunction suits collated, 78 have resulted in an affirmative grant at some stage of the proceedings, excluding *ex parte* stays. In at least 58, the Supreme Court<sup>10</sup> granted injunctions *pendente lite*,<sup>11</sup> while in 2 others the Appellate Division reversed denial and granted this type of relief. Only 33 cases reached trial. 23 permanent injunctions were granted<sup>12</sup> by the Supreme Court; of these, 3 were finally modified, 3 reversed, and 4 affirmed by the Court of Appeals. In only 28 cases was relief denied on the original motion;<sup>13</sup> 3 permanent orders and 1 *pendente lite*, issued by the lower courts, were dissolved by the Court of Appeals, while 9 *pendente lite* orders were dissolved on trial at Special Term. Of the 28 judgments in which relief was originally denied, 2 were reversed and *pendente lite* granted by the Appellate Division, and in 1 other a permanent injunction was granted on trial.<sup>14</sup> This record may

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*Pennsylvania Law Review* 456 (1936). ". . . inter-union warfare may be as bitter and as important to the participants as are struggles with organized capital. But in such internecine conflicts the courts have been little invoked." Sidney Post Simpson, "Fifty Years of American Equity," 50 *Harvard Law Review* 171 (1936).

<sup>9</sup> This and subsequent figures are drawn from the material contained in Appendices I and II. In 82 cases, the employer was the plaintiff, and in the remaining 29, suit was initiated by a union, although this does not imply that the actual litigant was the real party at interest, and not merely the front for another.

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<sup>10</sup> The Supreme Court is the original court of equity jurisdiction in New York. Appeal from its orders may be taken to the Appellate Division, and thence to the Court of Appeals, the court of last resort.

<sup>11</sup> Prior to the passage of the New York Anti-Injunction Act, Civil Practice Act, Sec. 876-a, an order *pendente lite* was issued before trial, on the basis of a complaint and supporting and answering affidavits.

<sup>12</sup> Of these, at least 6 were preceded by the issue of an order *pendente lite*, and 4 by the denial of such an order.

<sup>13</sup> In nine of these denials, the New York State Anti-Injunction Act was given as the reason: *Ansley Radio Corp. v. Carey*, N. Y. L. J., July 22, 1937; *Bacinski v. Douglass*, N. Y. L. J., Nov. 30, 1937; *Crawford Clothes v. Frankel*, N. Y. County Clerk Index 19663 (1937); *Glover v. Screen Theatres*, N. Y. County Clerk Index 511 (1936); *Bergman v. Levenson*, N. Y. L. J., April 28, 1939, p. 1955; *International Brotherhood of Building Trades Unions v. Doe*, Kings County Clerk Index 5298 (1938); *Jones Foods Inc. v. Doe*, N. Y. L. J., May 16, 1939 and June 15, 1939, p. 2771; *Times Square Concessions Inc. v. Meyer*, N. Y. County Clerk Index 31075 (1938); *Miele v. Sheet Metal Workers Association*, Queens Sup. Ct. (1937).

<sup>14</sup> The large discrepancy between the total number of labor cases recorded and the number that go to trial has been remarked by commentators. Witte, *op. cit.* at chap. v, n. 1, p. 93; Brissenden and Swayzee, *op. cit.* at n. 7.

seem startling in view of the general laissez-faire policy adopted by the Court of Appeals,<sup>15</sup> but it is no longer a source of surprise that the lower courts of New York have not always regarded their high court as an authority on questions of labor law.<sup>16</sup>

Although variation in situation is almost infinite, a few broad patterns are discernible. Most common is the attempt of an employer, who has contracted to hire the members of a union, to secure the termination of the picketing<sup>17</sup> of his establishment by members of a rival union.<sup>18</sup> In another type of suit it is the contracting union, anxious to protect its members, that is desirous of restraining economic coercion designed either to induce its employers to breach their contracts,<sup>19</sup> or to destroy its very existence.<sup>20</sup> The third chief cause of action arises from the efforts of a labor union to compel an

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<sup>15</sup> *Infra*, pp. 93-98.

<sup>16</sup> "This contrast is most marked in the doctrines laid down by the lower and higher courts in New York. While the Court of Appeals has adopted a consistent 'hands-off' policy, the lower courts have applied some of the most stringent rules in issuing injunctions." "Labor Injunctions Since the N. R. A.," 43 *Yale Law Journal* 625 (1934). Note also the somewhat caustic remark of Chief Justice Pound of the Court of Appeals in the Stillwell case: "The doctrine of the Hitchman case as applied to labor disputes by some of our lower courts has never been accepted here, if it has not been specifically rejected."

<sup>17</sup> Peaceful picketing, either accompanying or in the absence of a strike, carried on by a union against an employer in the same industry appears to be definitely legal. *Exchange Bakery v. Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927); *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931); *Goldfinger v. Feintuch*, 276 N. Y. 281, 11 N. E. (2d) 910 (1937).

<sup>18</sup> See, for example, *Rosekay Amusement Corp. v. Holmden*, 243 A. D. 82, 276 N. Y. S. 238 (1934); *Grow Lunch v. Kramberg*, N. Y. L. J., Nov. 25, 1935, p. 2056; *Bergman v. Levenson*, N. Y. L. J., April 28, 1939, p. 1955; *Hoffman's Vegetarian Restaurant v. Lee*, 10 N. Y. S. (2d) 287 (1939); *Stalban v. Freedman*, 11 N. Y. S. (2d) 343 (1939); *Purity Restaurant Inc. v. Doe*, Kings County Clerk Index 6126 (1939); *Rose Grill Inc. v. Oberkirsh*, Kings County Clerk Index 1833 (1939); *Spinner v. Paolillo*, N. Y. L. J., May 26, 1939, p. 2442; *Times Square Concessions v. Meyer*, New York County Clerk Index 31075 (1938).

<sup>19</sup> *Baum v. Field*, N. Y. County Clerk Index 3105 (1934); *Stone Cleaning and Pointing Union v. Russel*, 38 Misc. 513, 77 N. Y. S. 1049 (1902); *Wolchak v. Wiseman*, 145 Misc. 268, 259 N. Y. S. 225 (1932); *Independent Gas & Electric Union v. Consolidated Edison Co.*, N. Y. County Clerk Index 11767 (1938); *International Brotherhood of Building Trades Union v. Doe*, Kings County Clerk Index 5298 (1938).

<sup>20</sup> *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931); *Tallman v. Gaillard*, 27 Misc. 114, 57 N. Y. S. 419 (1899); *United Baker Workers Union v. Messing*, N. Y. L. J., Feb. 19, 1926, p. 2040; *United Cloak and Suit Designers v. Sigman*, 218 A. D. 367, 218 N. Y. S. 483 (1926).

employer, who, in violation of a collective agreement, has either retained or hired members of a rival union, to abide by the terms of such agreement and employ members of the complainant.<sup>21</sup>

The degree to which courts have intervened in granting relief has ranged from drastic limitation of all strike activity to prohibition of specific acts. A review of actual restraining orders will reveal with greater clarity than any theoretical discussion the means by which judges have attempted to solve embarrassing rival union disputes.

### PICKETING

It has already been remarked that peaceful picketing is, in general, legal in New York.<sup>22</sup> Prior to the *Exchange Bakery* case,<sup>23</sup> however, there was some doubt as to the legality of picketing in the absence of a strike.<sup>24</sup> It is not surprising, therefore, that all picketing aimed at the employed members of a rival union should have been enjoined.<sup>25</sup> The prevailing rationale was clearly stated by Justice (now Senator) Wagner:

I have invariably upheld the right of strikers by peaceful picketing to attempt to persuade others to support their cause. In the case at bar, however, no strike, as the term is known in law, exists. The plaintiff is obligated by a collective contract to employ members of the Amalgamated Food Workers Union [the rival.] Such an agreement is enforceable and the

<sup>21</sup> See Appendices III, IV and V.

<sup>22</sup> *Supra*, n. 17.

<sup>23</sup> *Exchange Bakery v. Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927).

<sup>24</sup> *Frankfurter and Greene, op. cit.* at n. 1, p. 31; *Witte, op. cit.* at n. 14, p. 37, footnote 1; "Peaceful Picketing in New York 1912-1926," 36 *Yale Law Journal* 557 (1926); "Picketing by Labor Unions in the Absence of a Strike," 40 *Harvard Law Review* 896 (1927), esp. footnotes 1 and 2 at p. 896 and the cases cited therein; "The Privilege of Picketing an Establishment When No Strike Is in Progress," 27 *Columbia Law Review* 190 (1927); *Landis, op. cit.* at chap. v, n. 49, p. 244, footnote 1.

<sup>25</sup> *Bart v. Markowitz*, Kings County Clerk Index 19596 (1924); *Klappholz v. Goodleman*, Kings County Clerk Index 16025 (1921); *Public Baking Co. v. Stern, pendente lite*, N. Y. County Clerk Index 40723 (1925); *Rosen Bros. v. Mackler, pendente lite*, N. Y. L. J., Mar. 27, 1924; *Schlesinger v. Messing, pendente lite*, N. Y. County Clerk Index 30993 (1924); *Sigman & Cohen v. American Shoe Workers Protective Union*, N. Y. L. J., Jan. 7, 1925, p. 1322; *Somerspitz v. Fleisher*, N. Y. L. J., Jan. 4, 1924, p. 1182; *Goldin v. Borzekowsky*, Bronx County Clerk Index 2801 (1924); *United Baker Workers Union v. Messing, pendente lite*, N. Y. County Clerk Index 47105 (1924); *Vogel v. Greenspan*, N. Y. L. J., Nov. 26, 1924, p. 783; *Michaels v. Hillman*, 112 Misc. 395, 183 N. Y. S. 195 (1920); *Wilner v. Bless*, 214 N. Y. S. 939, *affd.* 243 N. Y. 544, 154 N. E. 598 (1926).

courts of equity have by restraining orders prevented employers from violating them. The picketing in the instant case, in effect, is an attempt to compel a violation by plaintiff of his contract obligation. This a court of equity cannot permit. The picketing is therefore restrained.<sup>26</sup>

Some voices, it is true, were raised in dissent, but this was generally due to the existence of special circumstances, such as substantiation of the charge that the "inside" union was employer dominated.<sup>27</sup> In the *Exchange Bakery* case, however, the Court of Appeals indicated in no uncertain terms that "Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose."<sup>28</sup> But this left undecided the question of whether picketing to induce a breach of contract constituted a lawful purpose, and in the absence of an express ruling on this point the majority of the courts held that it did not.<sup>29</sup> The dissents were, however, stronger this time.<sup>30</sup> Finally, that the doctrine was to be applied to rival union picketing was made clear in the *Stillwell* case, in which the Court of Appeals held:

The collateral result of the attempted persuasion of the public not to patronize the theatre while it employed the members of the rival union

<sup>26</sup> *Somerspitz v. Fleisher*, N. Y. L. J., Jan. 4, 1924, p. 1182.

<sup>27</sup> The issue of company unionism is discussed *infra*, pp. 91-93.

<sup>28</sup> *Exchange Bakery v. Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927).

<sup>29</sup> *Brooklyn United Theatres v. Kaplan*, 257 N. Y. 555, 178 N. E. 793 (1931); *Steinkritz Amusement Co. v. Kaplan*, 257 N. Y. 294, 178 N. E. 11 (1931) (the ban on picketing in the two foregoing cases was affirmed by the Court of Appeals on the basis of unlawful means); *College Theatre v. Kaplan*, 233 A. D. 870, 250 N. Y. S. 759 (1931); *Esco Operating Co. v. Kaplan*, 144 Misc. 648, 258 N. Y. S. 303 (1932) (misleading signs); *Fox v. Gold*, N. Y. County Clerk Index 39400 (1931); *Herzog v. Cline*, 131 Misc. 816, 227 N. Y. S. 462 (1927); *Kimberg v. Wasserman*, 227 N. Y. S. 462 (1927); *Rifkin v. Cline*, Kings County Clerk Index 5452 (1928); *J. H. S. Theatres v. Fay*, 236 A. D. 744 (1932), (*revd.* on authority of the *Stillwell* case, 260 N. Y. 315); *M. B. M. Baking Co. v. Obermeier*, N. Y. L. J., Sept. 23, 1931, p. 2681 (misleading and malicious signs); *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931) (previous injunction permitting peaceful picketing had been violated); *Park Lane Baking Co. v. Christel*, N. Y. L. J., July 11, 1930, p. 1865; *Sanders v. Kaplan*, Kings County Clerk Index 385 (1927); *Wolchak v. Wiseman*, 145 Misc. 268, 259 N. Y. S. 225 (1932).

<sup>30</sup> See concurring opinions of Justices Lehman and Cardozo in *Brooklyn United Theatres v. Kaplan*, 257 N. Y. 555, 178 N. E. 793 (1931) and *Steinkritz Amusement Corp. v. Kaplan*, 257 N. Y. 294, 178 N. E. 11 (1931), in which they voted "to modify the judgment . . . by limiting the injunction to picketing with an untruthful sign"; *Regun Operating Co. v. Kaplan*, N. Y. County Clerk Index 11378 (1930); *Roosevelt Amusement Corp. v. Empire State Union*, 144 Misc. 644, 258 N. Y. S. 240, *affd.* 231 A. D. 872 (1930).

might make it unprofitable for the employer to go on with the contract, but to state fairly and truly to the public that the conduct of the employer is socially objectionable to a labor union is no persuasion to break a contract. This court has never undertaken to restrain such conduct, although it has had the opportunity. It has been at pains to avoid doing so.<sup>31</sup>

In the face of these unmistakable dicta, some lower courts, when confronted with facts similar to those which the Court of Appeals considered, still persisted in granting full relief and prohibiting all picketing, taking as their text the qualifying portion of the Court of Appeals' amplifying statement that "The injunction must be limited to prohibition of specific unlawful acts except insofar as a broader prohibition has for its legitimate end protection against such acts,"<sup>32</sup> and supporting their decisions with findings of intimidation and violence,<sup>33</sup> fraudulent advertising,<sup>34</sup> or the existence of some unusual circumstance.<sup>35</sup> On the whole, however, the inferior courts have been brought to the realization that the rulings of the Court of Appeals on rival union picketing constitute a proper source of law,<sup>36</sup>

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<sup>31</sup> *Stillwell Theatre v. Kaplan*, 259 N. Y. 405, 182 N. E. 63 (1932).

<sup>32</sup> *J. H. S. Theatres v. Fay*, 260 N. Y. 315, 183 N. E. 509 (1932).

<sup>33</sup> *Cowan v. Beauty Culturists Union*, Kings County Clerk Index 14271 (1934); *Municipal Dye Works v. Kalos*, Kings County Clerk Index 21250 (1933); *B & M Cleaners and Dyers v. Kalos*, N. Y. L. J., Oct. 28, 1933, p. 1515; *Traube Dry Cleaning v. Kalos*, N. Y. L. J., Oct. 28, 1933, p. 1515; *Paramount Beauty Shoppe v. Beauty Culturists Union*, Kings County Clerk Index 7925 (1935) (the latter four were granted by Mr. Justice Cuff); *Rosekay Amusement Corp. v. Holmden*, N. Y. L. J., Sept. 10, 1934, p. 691, *affd.* 243 A. D. 82, 276 N. Y. S. 238; *Bert Amusement v. Holmden*, *idem*, *affd.* 243 A. D. 81, 276 N. Y. S. 236 (1934); *Ideal Cleaners and Dyers v. Kalos*, Kings County Clerk Index 19412 (1933); *Nathan's Famous v. Winter*, Kings County Clerk Index 8820 (1934).

<sup>34</sup> *Herschlag v. Schlansky*, N. Y. L. J., Dec. 14, 1934, p. 2386.

<sup>35</sup> *Millinery Center Restaurant v. Lehman*, N. Y. County Clerk Index 10789 (1934) (dispute between two locals belonging to the same international union. The court held: "It seems to me that the situation here presented is unlike that in *Stillwell Theatres Inc. v. Kaplan*"); *Westbury Sportswear v. Dubinsky*, Kings County Clerk Index 2975 (1934) (jurisdictional dispute between the International Ladies Garment Workers Union and the United Textile Workers Union); *Stevens Cafeteria v. Halperin*, N. Y. L. J., Apr. 24, 1935, p. 2107 (violation of arbitration agreement).

<sup>36</sup> *Adler v. Aumiller*, N. Y. L. J., Apr. 24, 1934, p. 1975; *Andear Amusement Co. v. De Agostina*, N. Y. L. J., Mar. 22, 1934, p. 1380; *Baum v. Field*, N. Y. County Clerk Index 3105 (1934); *De Agostina v. Holmden*, 157 Misc. 816, 285 N. Y. S. 909 (1935); *Edjomac Amusement Corp. v. Empire State Union*, 156 Misc. 856, 288 N. Y. S. 756 (1935); *Grow Lunch v. Kramberg*, N. Y. L. J., Nov. 25, 1935, p. 2056; 133—2nd Ave. Amusement Co. v. Empire State Union, N. Y. County Clerk Index 21,000 (1935); *Stevens Cafeteria v. Halperin*, N. Y. L. J., Apr. 24, 1935, p. 2107.

although recently a justice of the Supreme Court, specifically noting his "inability to follow unreservedly the *Stillwell* doctrine," went on to state that in view of additional legislative concessions to labor, "logic demands that the phrase 'allowable area of conflict' be construed so as to give back to our courts its [sic] equity powers in labor relations, at least to the extent of enabling them to thwart union conduct when and if its purpose is to induce by pressure the breaking of lawful contracts."<sup>37</sup> There have been sporadic evidences of a desire to prescribe the number of pickets and the type of picketing that may be employed<sup>38</sup> along the lines of the United States Supreme Court's decision in the *Tri-City* case,<sup>39</sup> but the right of peaceful rival union picketing appears to be well established.<sup>40</sup>

### JUDICIAL PRESCRIPTION OF PLACARDS

Courts have often attempted, with greater assiduity than success, to curb the notorious ingenuity which enables men to circumvent the spirit of the truth without exceeding its letter when advertising a cause. A brief review of this process may serve to reveal the wisdom of Justice Cardozo's admonition that "Courts have enough to do in restraining physical disorder without busying themselves with logomachies in which the embattled words are the expression of the opinion of the writer or the speaker."<sup>41</sup>

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<sup>37</sup> *Stalban v. Freedman*, 11 N. Y. S. (2d) 343 (1939). In this curious decision, which flies in the face of the *Stillwell* case, the late Justice Cotillo based his conclusions upon the theory that since courts of equity should keep pace with current developments, the Court of Appeals might well reverse itself in view of what he believed to be the increasing disparity between large and powerful labor aggregations and small, defenseless entrepreneurs. A permanent injunction against picketing was issued.

<sup>38</sup> One picket was permitted in *Andear Amusement v. De Agostina*, N. Y. L. J., Mar. 22, 1934, p. 1380; two pickets in *De Agostina v. Holmden*, 157 Misc. 816, 285 N. Y. S. 909 (1935) and in 133—2nd Ave. Amusement Co. v. Empire State Union, N. Y. County Clerk Index 21000 (1935); while in *Eagle Pencil Co. v. Carey*, N. Y. L. J., July 16, 1938, p. 144, Justice Steuer permitted a maximum of ten pickets on each avenue and thirty on each street upon which the premises of the plaintiff faced.

<sup>39</sup> *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184 (1921).

<sup>40</sup> This conclusion is strengthened by the effects of the New York State Anti-Injunction Act, Civil Practice Act, Sec. 876a. See also *People v. Epstein*, 159 Misc. 330, 287 N. Y. S. 429 (1936); in which a conviction for dual union picketing was reversed in Special Sessions.

<sup>41</sup> *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931).

Placards bearing the exact or approximate legend "Members of the X Union on Strike" early felt the weight of judicial displeasure.<sup>42</sup> The argument against them ran as follows:

Giving to the defendants all possible benefit of a finding that the picketing . . . was peaceful, it was still unlawful because accompanied by the carrying of signs declaring a 'Strike at this Theatre' . . . , whereas there was no strike but only a non-renewal of the contract between the defendant union and the plaintiff, the latter instead having entered into a contract with another organization.<sup>43</sup>

With "Strike" legends barred, statements of a more discreet nature were resorted to. A banner bearing the words "An Appeal—Do Not Patronize This Theatre. Its Management Does Not Employ Union Operators Members of Allied Motion Picture Operators Union" was held to be "deceptive . . . and calculated to create the impression that the plaintiff does not employ union labor."<sup>44</sup> To overcome this obstacle, picketing signs were changed to declare, roughly: "This Establishment is Unfair to Organized Labor. It Does Not Employ Members of the X Union." In spite of the fact that this motif is a more complete statement, a number of judges felt that it contained an element of ambiguity sufficiently strong to justify an order which either restrained its use entirely<sup>45</sup> or, more moderately, required the addition of qualifying phrases indicating that the employer had contracted with a rival union, these phrases to be printed in as large a lettering as the original inscription.<sup>46</sup> Justice

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<sup>42</sup> Brooklyn United Theatres Inc. v. Kaplan, 232 A. D. 828, 248 N. Y. S. 623 (1931); Grow Lunch v. Kramberg, N. Y. L. J., Nov. 25, 1935, p. 2056; Rosekay Amusement v. Holmden, N. Y. L. J., Sept. 10, 1934, p. 691; M. K. C. Cafeteria v. Feigenbaum, N. Y. L. J., Oct. 5, 1934, p. 1118; Nathan's Famous v. Winter, Kings County Clerk Index 8820 (1934); Sigman and Cohen v. American Shoe Workers Protective Union, N. Y. L. J., Jan. 7, 1925, p. 1322. A similar fate befell the announcement of a lockout when the facts disclosed that plaintiff had merely refused to renew a closed shop contract and had signed an agreement with another union. Wilner v. Bless, 243 N. Y. 544, 154 N. E. 598 (1926); Tudor Shoe v. Epstein, N. Y. County Clerk Index 17011 (1937).

<sup>43</sup> Brooklyn United Theatres Inc. v. Kaplan, Kings County Clerk Index 21662 (1928). See Stalban v. Freedman, 11 N. Y. S. (2d) 343 (1939).

<sup>44</sup> Andear Amusement Corp. v. De Agostina, N. Y. County Clerk Index 6861 (1934).

<sup>45</sup> Steven's Cafeteria v. Halperin, N. Y. L. J., Apr. 24, 1935, p. 2107.

<sup>46</sup> Edjomac Amusement Corp. v. Empire State Union, 156 Misc. 856, 288 N. Y. S. 756 (1935); Regun Operating Co. v. Kaplan, N. Y. County Clerk Index 11378 (1930); Grow Lunch v. Kramberg, N. Y. L. J., Nov.

Rosenman remarked that these signs "are accurate as far as the letter of truth is concerned. Their implication, however, is untruthful . . . . They represent, and are intended to represent to passerby that the employer refuses to employ union help . . . . That natural impression is not in accord with the facts."<sup>47</sup> The reversal of the *Edjomac* case,<sup>48</sup> however, would seem to point to the legality of this latter type of sign and to mark a return to Justice Lewis' opinion of a decade ago, in which, considering words of an identical tenor, he ruled that "defendants would have a right to state what they have printed in their signs if that be the fact. I can find no case which enjoins the right to freely utter and publish that which is the truth."<sup>49</sup>

It does not appear to be libelous to apply the terms "dual" and "company" union to a rival labor organization. For this "is not to attribute to it or its management any conduct or status injurious to its reputation or credit. These words, fairly construed, do not tend

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25, 1935, p. 2056; *Tudor Shoe Co. v. Epstein*, N. Y. County Clerk Index 17011 (1937). This leads to the not humorless situation wherein a union is required to advertise its rival.

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<sup>47</sup> *Edjomac Amusement Corp. v. Empire State Union*, 156 Misc. 856, 283 N. Y. S. 6 (1935). Regarding this case, a commentator in 36 *Columbia Law Review* 840 (1936) wrote that "The requisite falsity has heretofore been found only in outright misstatements of fact, in statements of opinion where the only conditions upon which the opinion could reasonably have been based did not exist, and in general statements which created a mistaken impression because of their ambiguity," and advocated rejection of the principles stated therein "in view of the impossibility of telling long stories on picket signs and the ease with which the employer could himself disclose any information he deemed relevant." Another commentator in 4 *International Juridical Association Bulletin* No. 7 (1935) remarked that "an attempt to compel rival unions to advertise each other is an assumption of judicial power which ignores the essence of a picketing sign as a partisan appeal."

<sup>48</sup> *Edjomac Amusement Corp. v. Empire State Union*, 273 N. Y. 647, 8 N. E. (2d) 329 (1937).

<sup>49</sup> *Carnation Photoplay Co. v. Basson*, N. Y. L. J., Dec. 29, 1925, p. 1264. More recently, a sign reading "'This . . . Shop Refuses to Employ Union Operators of the [X] Union, Local No. 1'" received approval in *Paramount Beauty Shoppe v. Beauty Culturists Union*, 93 N. Y. L. J. 1769 (1935), but in the same case an injunctive order prohibited the defendant from stating that "plaintiff's business is . . . unfair to union labor." Another sign claiming that an employer was "unfair to union labor" was called an "expression of opinion" and "not a matter for the court to pass upon." *Gambarelli v. Oneto*, N. Y. L. J., Dec. 23, 1937, p. 2330. See also *Jones Foods Inc. v. Doe*, N. Y. L. J., June 15, 1939, p. 2771.

to hold it up to public contempt or ridicule. The term 'company union' is defined in our Labor Relations Act as having a meaning which is not suggestive of defamation in any way. Neither does a libelous meaning attach to the expression 'dual organization' which ordinarily implies that there is a rival or opposing organization in the field."<sup>50</sup>

Proscription of a miscellany of other words and phrases has accompanied the efforts of unions to discredit their rivals. While use of the opprobrious epithet "scab" has been prohibited at times,<sup>51</sup> it is now apparently legal to apply that ungracious term to a rival union, Justice Cardozo having held:

These statements . . . are in essence expressions of opinion, dependent, in the main, upon an appraisal of methods and motives, and gaining much of their significance from context and occasion . . . . The opinion may be erroneous, but it does not follow that the defendant will be required to withdraw it under penalty of contempt. Indeed, there is a near approach to the ludicrous when a member of one union debating an industrial dispute with a member of another, is restrained by the solemn mandate of an injunction from stating his belief that the rival union is a 'scab'.<sup>52</sup>

An unsubstantiated charge of racial discrimination raised against a union has been enjoined.<sup>53</sup> In the same case, the legend "Demand

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<sup>50</sup> *National Variety Artists Inc. v. Mosconi*, N. Y. L. J., Feb. 2, 1939, p. 524.

<sup>51</sup> *Public Baking Co. v. Stern*, N. Y. County Clerk Index 40723 (1925) (the temporary injunction therein issued by Mr. Justice Mahoney enjoined the defendant, among other things, "from authorizing, permitting, or joining in the distribution of circulars . . . stating . . . that the places of business conducted by the plaintiff . . . are non-union or 'scab' shops"); *Michaels v. Hillman*, 112 Misc. 395, 183 N. Y. S. 195 (1920); *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931) (lower court injunction reprinted here); *Vogel v. Greenspan*, N. Y. L. J., Nov. 26, 1924, p. 783.

<sup>52</sup> *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931). A magistrate refused to convict for this conduct in *People v. Cohen*, *N. Y. Times*, Jan. 20, 1938.

<sup>53</sup> *Adler v. Aumiller*, Bronx County Clerk Index 3509, 3743 (1934). The handbill complained of read: "We, the Jewish Bakery Workers, discriminated against, thrown out, slugged by the anti-semitic band of the Amalgamated Food Workers Union, Local 164, Bronx, thrown out of Jewish Bakery Shops, where you Jewish consumers buy your bread . . . have had no other choice but with the help of the United Hebrew Trades to organize ourselves under the International Bakery Workers Union . . . . Support International Union Shops Only, and Not the Anti-Semitic Shops." In answer, it was alleged that half the membership of the Amalgamated Union was Jewish.

Bread With This Union Label, A. F. W., Amalgamated Food Workers," used in picketing the shops of rivals, was permitted.<sup>54</sup>

These restrictions are symptomatic of a desire to balance more finely the interests of all parties to disputes. They have replaced, to a large extent, the blanket prohibitions that were formerly all too common.<sup>55</sup> However, when the courts recognize that industrial disputes cannot be eliminated or even minimized by a minute regulation of the every day conduct of strikers, these too may tend to disappear.

### OTHER SUBJECTS OF RESTRAINT

A frequent topic of discussion is the right of organizers to solicit rival union men in an effort to induce them either to leave their employment in violation of existing contracts<sup>56</sup> or to give up membership in their own union. When inducing a breach of contract is held unjustifiable, typical general restraining clauses forbid "approaching, proselyting, propagandizing, inducing, attempting to induce, threatening, assaulting or intimidating any of the officers, agents or employees of the plaintiffs."<sup>57</sup> In a series of decisions,<sup>58</sup>

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<sup>54</sup> *Adler v. Aumiller*, Bronx County Clerk Index 3509, 3743 (1934). However, "representing that the defendant International Union has the only union label" was restrained in *Winthrop Baking v. Bless*, N. Y. L. J., Oct. 3, 1927, p. 42.

<sup>55</sup> *Frankfurter and Greene, op. cit.* at n. 1, pp. 89-105.

<sup>56</sup> See *supra*, pp. 63-69.

<sup>57</sup> *Rosekay Amusement Corp. v. Holmden*, N. Y. L. J., Sept. 10, 1934, p. 691. Similar clauses: "From persuading or inducing or enticing or from attempting to persuade or induce or entice any member of the plaintiff employed by the Boss Bakers with whom the plaintiff has entered into contracts," *United Baker Workers Union, v. Messing*, N. Y. County Clerk Index 47105 (1924); "From persuading or inducing or enticing or from attempting to persuade or induce or entice any member of the United Baker Workers Union, Inc. employed by the plaintiff to leave his employment in violation of the contract made between the plaintiff and the said United," *Public Baking Co. v. Stern*, N. Y. County Clerk Index 40723 (1925); "from persuading or inducing any persons in the employ of the plaintiffs to terminate their employment with the plaintiffs," *Millinery Center Restaurant v. Lehman*, N. Y. County Clerk Index 10789 (1934); "seeking to secure the abrogation of the contract made between plaintiff and the Boot and Shoe Workers Union, affiliated with the A. F. of L.," *Coon v. Meinhart*, 112 Misc. 650, 183 N. Y. S. 713 (1920); "The defendants may be restrained from endeavoring to 'persuade' plaintiff's employees to violate, or to cause the abrogation or violation of, the working contract between the plaintiffs and the United Garment Workers of America," *Michaels v. Hillman*, 181 N. Y. S. 165 (1920); "attempting to persuade, induce or compel the em-

however, the Court of Appeals made it clear, by expunging similar clauses from injunction decrees, that only "specific unlawful acts" may be restrained. Similarly, a clause restraining "persuading or inducing any member of plaintiff union to . . . withdraw or resign from such union" was stricken out in the *Nann* case as "an impairment of the defendant's indubitable right to win converts over to its fold by recourse to peaceable persuasion, and to induce them by like methods to renounce allegiance to its rival."<sup>59</sup> Use of deceitful means is not countenanced; in one case, efforts to win over the membership of a rival by means of setting up a council in the name of the rival and using membership books bearing that name were enjoined.<sup>60</sup>

When employers, in violation of agreements, have hired members of unions rival to the contracting one, they have been ordered to discharge these men<sup>61</sup> and to employ those for whose services they

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ployees of plaintiff to breach their written contract," *Winthrop Baking Co. v. Bless*, N. Y. L. J., Oct. 3, 1927, p. 42.

<sup>58</sup> *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931); *Steinkritz Amusement Corp. v. Kaplan*, 257 N. Y. 294, 178 N. E. 11 (1931); *J. H. S. Theatres v. Fay*, 260 N. Y. 315, 183 N. E. 509 (1932).

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<sup>59</sup> *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931). A rather unusual decree was issued in *Horan v. Barrett*, N. Y. County Clerk Index 11,333 (1936), a case involving the efforts of a dissident group in the Manhattan Superintendents Union, Local No. 32, to set up a rival union, the Building Service Employees Union. In a suit by the parent, the latter group was enjoined "from soliciting and requesting members of Manhattan Superintendents Union, Local 32, to abandon, resign, or give up their membership in said union upon misrepresentation concerning said union; from soliciting men to join any other union without first explaining, clearly and distinctly, that such defendants, or any of them, are not officers or representatives of Manhattan Superintendents Union, Local 32."

<sup>60</sup> *Kaufman v. Gold*, N. Y. County Clerk Index 4289 (1932). In this fight between the International Fur Workers Union, A. F. of L. and the Fur Workers Industrial Union, T. U. U. L., the latter was instrumental in the formation of a "Furriers Joint Council of New York of the International Fur Workers Union of the American Federation of Labor," with which it proceeded to hold "unity" meetings, in defiance of the officers of the International Fur Workers Union. A comparable situation arose in *Possehl v. Burpo*, N. Y. County Clerk Index 7260 (1937), where Local 276 of the suspended International Union of Mine, Mill and Smelter Workers was enjoined from declaring itself to be affiliated with the American Federation of Labor.

<sup>61</sup> *De Agostina v. Holmden*, 157 Misc. 816, 285 N. Y. S. 909 (1935); *Roosevelt Amusement Corp. v. Empire State Union*, 144 Misc. 644, 258 N. Y. S. 240 (1930).

had contracted.<sup>62</sup> Other injunctions have prevented union mergers by enjoining the dissolution of one of the unions,<sup>63</sup> and have forbidden "impeding, obstructing, hampering, or interfering with the continuance of the plaintiff organization."<sup>64</sup> The Court of Appeals, however, by carefully scrutinizing and narrowing several comprehensive orders tended to curb, in rival union suits at least, the creative imagination of the astute attorneys who were responsible for the preparation of catch-all injunction decrees.<sup>65</sup>

### THE FLEXIBLE ARM OF EQUITY

In several instances judges have attempted to get at the roots of rival union controversy by going beyond the mere denial or grant of the specific relief prayed for in the bill of complaint. In all of these cases, unusual enough to warrant brief description, the final orders were preceded by painstaking inquiry<sup>66</sup> into the causes and ramifications of the disputes.

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<sup>62</sup> *De Agostina v. Holmden*, 157 Misc. 816, 285 N. Y. S. 909 (1935). See, however, *Murphy v. Practical Bookbinding Co.*, N. Y. County Clerk Index 12300 (1938) where the Court, in a similar situation, held: "As between these rival unions the choice of the workers should prevail; the Court should not interfere with that choice."

<sup>63</sup> *Esco Operating Co. v. Empire State Union*, N. Y. L. J., Oct. 7, 1933, p. 1207. The basis for this unusual step was that the holder of a collective labor contract with the union which wished to dissolve would remain without adequate remedy. A similar action was unsuccessful, however: *Gotham Amusement Co. v. Glover*, N. Y. County Clerk Index 9758 (1937). In the former action, a proposed merger of Local 306 and the Empire State Union, a step which would have brought peace to the New York motion picture industry, was effectively discouraged by court decree. In the latter, a similar truce between Local 306 and the Allied Motion Picture Operators Union, brought about with a great deal of difficulty by the mayor of New York City, might have been forestalled had plaintiff succeeded in its suit.

<sup>64</sup> *United Cloak and Suit Designers v. Sigman*, 218 A. D. 367, 218 N. Y. S. 483 (1926).

<sup>65</sup> An outstanding exception was the decree in *Nathan's Famous v. Winter*, Kings County Clerk Index 8820 (1934). On the basis of lengthy affidavits, designed primarily to prove that defendant union was engaged in a direct attempt to sabotage the capitalistic framework of the United States, Justice Faber issued an injunction *pendente lite* which restrained, among other things, the hiring of a loft or store within a radius of 10 square blocks of plaintiff's place of business for the purpose of carrying on strike activities, and the transmission of letters to employees or neighbors setting forth the fact that a strike existed.

<sup>66</sup> For instance, in *De Agostina v. Leff*, N. Y. L. J., Jan. 27, 1936, p. 480, oral testimony taken filled some dozen large volumes and covered the entire history of the motion picture machine operators.

## NEW YORK COURTS

In 1924, a group of master bakers in New York City refused to renew its collective agreement with Bakery and Confectionery Workers International Union, A. F. L., and instead contracted to hire the members of United Baker Workers, Inc., a new group. Efforts by the displaced union to regain its former position were met with legal proceedings which resulted in the issuance of several restraining orders directed against it.<sup>67</sup> Although the defendant had alleged in every case that United Baker Workers Union Inc. was not a bona fide labor organization, it remained for Justice Crain to take judicial cognizance of the charge and reflect its implications in an opinion. He declared:

I am convinced that the principal reason which led to the organization of of the so-called union [United Baker Workers, Inc.] . . . was that an organization of master-bakers desired to bring into existence, under the guise of a labor union, an organization which in the event of strikes would supply master-bakers with working bakers. The master baker's association was doubtless mindful of the fact that there were certain decisions holding that after a shop in which there was a strike became unionized, if picketing were thereafter continued, it could be contended that such picketing was an illegal effort on the part of the strikers to force the master baker whose shop was affected to break his contract with the union from whom he had obtained the workers to fill the places of the men who went on strike.<sup>68</sup>

The court, holding in reserve a threat to enjoin picketing, ordered the defendant, the Bakery and Confectionary Workers Union, to submit a stipulation agreeing: (1) to accept into membership all of plaintiff's employees, on terms of equality; (2) to permit these employees to remain in plaintiff's employ until the expiration of the contract with the United Baker Workers Union, Inc., and in accordance with the conditions and terms of employment provided for in that agreement; (3) to save harmless the plaintiff from all claims, demands and suits brought by the United Baker Workers Union, growing out of the breach of the agreement with that union. The plaintiff employer was required to stipulate that he would not there-

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<sup>67</sup> *Bart v. Markowitz*, Kings County Clerk Index 19596 (1924); *Probsky v. Rubinberg*, Kings County Clerk Index 3900 (1923); *Public Baking Co. v. Stern*, N. Y. L. J., Dec. 23, 1925; *Goldin v. Borzekowsky*, Bronx County Clerk Index 2801 (1924); *Schor v. Borzekowsky*, Bronx County Clerk Index 2763 (1924); *Flakowitz v. Borzekowsky*, Bronx County Clerk Index 2624 (1924).

<sup>68</sup> *Schlessinger v. Messing*, N. Y. L. J., Dec. 17, 1924, p. 1059.

after employ any member of the United Baker Workers Union, Inc. Proceedings were dropped upon the submission of the required stipulations.

Although this particular dispute was successfully concluded, similar incidents in this same industry arose to plague the courts. The situation as a whole was finally exposed to the light of thorough analysis in a lucid and memorable opinion rendered by the late Justice Cotillo,<sup>69</sup> which unfortunately has never been reported.<sup>70</sup> Setting up eight general characteristics of a bona fide labor organization,<sup>71</sup> he found that "the plaintiff [United Baker Workers Union] is not a labor union because from the evidence it does not possess any of the customary features of a labor union, nor does the plaintiff conduct itself as such."<sup>72</sup> Delivering a stinging rebuke to the organizers of the United Baker Workers Union, and failing to find proof of alleged acts of violence, the court declined to enjoin the defendant union from making efforts to oust members of the United. Shortly thereafter the United Baker Workers Union, largely as a result of this decision, went out of existence.<sup>73</sup>

Another noteworthy instance of the broad exercise of equitable discretion may be found in a more recent case where the Empire State Motion Picture Operators Union was suing for specific performance of a closed shop agreement as against its rival, Local 306. After remarking that "the number of unemployed in the plaintiff

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<sup>69</sup> *United Baker Workers Union v. Messing*, N. Y. L. J., Feb. 19, 1926, p. 2040.

<sup>70</sup> Several labor attorneys, in private conversation, have expressed their belief that the reporting of this decision would have drastically altered the law of "company-unionism."

<sup>71</sup> These were, in brief: (1) The primary object of such a society is to secure the most favorable conditions with regard to wages and hours of labor; (2) Equal benefit for all members; (3) The purpose of a union is to counteract the greater economic power of the employer, and therefore it should not aid the employer in depressing labor standards; (4) It is supported and financed by its own members; (5) It is generally chartered by a national organization; (6) As a rule, it is represented in a local central body; (7) Membership is regular, with responsible officials; (8) There are rules of procedure or by-laws.

<sup>72</sup> *United Baker Workers Union v. Messing*, N. Y. L. J., Feb. 19, 1926, p. 2040.

<sup>73</sup> See Anna Berger, "Use of the Labor Injunction Against the New York Bakery Workers" (Unpublished manuscript in the library of Columbia University).

union is comparatively small, that of defendant is large" and indicating that "Notice must be taken that we are still faced with grave problems of unemployment, economic distress and destitution," Justice Hammer concluded: "Natural justice, which is the motivating force of equity, requires that the decree spring not alone from the conscience but be tempered by what is commonly known of public conditions."<sup>74</sup> Finding it imperative to grant the injunction as a matter of law, the court nevertheless postponed its execution until the termination of the closed shop agreement, thus in effect maintaining the status quo and avoiding a damaging disruption of presumably satisfactory employment relationships.

An interesting compromise was worked out in *Rifkin v. Cline*,<sup>75</sup> decided in 1928. Two unions, the Retail Dairy and Grocery Clerks Union and the Retail Grocery and Dairy Clerks Union were simultaneously picketing a small retail establishment whose owner had refused to deal with either of them. By the terms of an order *pendente lite*, the former union was restrained unconditionally from all picketing as a party without interest. The latter, however, consented to the restraint of picketing on condition that the employer stipulate that, if in the future he should hire outside labor (it was alleged that only members of the owner's family were employed), it should be supplied by the Retail Grocery and Dairy Clerks Union. The stipulation was entered and the order issued.

The foregoing examples have involved application of what has been described as "the external and objective test of merit."<sup>76</sup> The generally satisfactory conclusions that were reached may in large measure be attributed to the statesmanship of the individual judges involved. However, careful consideration must be given to the wisdom of entrusting the delicate and far reaching economic questions involved in rival unionism to individuals whose primary interests are legalistic and whose social origins too often predispose them against the trade union.<sup>77</sup> The assertion that "to make justification

<sup>74</sup> *De Agostina v. Leff Theatres Inc.*, N. Y. L. J., Jan. 27, 1936, p. 480.

<sup>75</sup> Kings County Clerk Index 5452 (1928).

<sup>76</sup> "Picketing to Compel Substitution of One Union for Another," 21 *Cornell Law Quarterly* 640 (1936).

<sup>77</sup> The charge that judges, in their dislike of radicalism, will deal unfairly with unions which can be shown to be linked to a radical political movement has been a favorite theme of the left-wing press. See, for instance,

for picketing by one union to supplant another depend upon the relative merits of the competing unions is to strike a finer balancing of the interests of employer and labor,"<sup>78</sup> is at least open to question.

### THE CLOSED SHOP

A commentator in the *International Juridical Association Bulletin* contends that

A court of equity, in considering an application to restrain an employer from breaching the terms of a closed shop contract, would be obliged to recognize the existence of the struggle between the rival unions . . . the assumption that because the courts have enjoined violations of closed shop contracts in cases where the controversy was between an employer and a union, it will similarly enjoin such breaches in situations where there is a struggle for recognition and employment by rival unions, is unwarranted . . . . The cases indicate that where there is a conflict between an employer and a union, a court of equity will enjoin violations of a closed shop agreement, but an injunction will not issue to restrain violations where there are rival unions.<sup>79</sup>

While no doubt these statements would seem to be logical deductions from the *Stillwell* case, they are not justified by an examination of the court decisions. There is no indication that New York courts are receding from the position that bona fide labor agreements are

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2 *International Juridical Association Bulletin* No. 5 (1933). The pains with which complaining attorneys often seek to prove the radical character of defendant unions might seem to justify this view in part. See *Nathan's Famous v. Winter*, Kings County Clerk Index 8820 (1934) (affidavits submitted by plaintiff); *Nuremberg v. Associated Fur Coat and Trimming Manufacturers*, N. Y. County Clerk Index 20051 (1933) (affidavits submitted by plaintiff); *Bedford Cleaning and Dyeing Corp. v. Kalos*, Kings County Clerk Index 21649 (1933) (affidavits of plaintiff). In one case, a judge remarked that "the answers of others showed that they put the principles of the Red International of Trade Unions above the Constitution of the United States," but he quickly went on to disclaim the relevancy of this finding: "This court, however, is merely concerned with whether or not the theories were translated into and became the basis of illegal resistance to a lawful injunction of this court." *Wolchak v. Wiseman*, 145 Misc. 268, 259 N. Y. S. 225 (1932).

Whatever inference one may draw from facts of a similar nature, it is indisputable that the political views of a union have never been specifically used, in New York, as the basis for discriminating against that union and in favor of a rival union with a more conservative ideology. Indeed, such discrimination might even be violative of the constitutional oath of office.

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<sup>78</sup> 21 *Cornell Law Quarterly* 640, *op. cit.* at n. 76, footnote 82.

<sup>79</sup> 2 *International Juridical Association Bulletin* No. 12 (1934).

to be enforced as contracts.<sup>80</sup> On the contrary, so strong has the policy of strict enforcement become that Justice Hammer, in *De Agostina v. Leff Theatres Inc.*,<sup>81</sup> felt obliged to grant performance of a closed shop contract when it meant the discharge of rival union men, although he demonstrated his sympathy with the views expressed above by postponing the execution of the decree. An examination of the 38 cases listed in Appendices III, IV, and V, all of them entered to enjoin the breach of closed shop agreements and practically all involving rival unions, reveals that in 11 instances the relief was granted, in 13 it was denied, while the remaining cases were discontinued. Of the 13 denied, however, not one gave any indication that denial was based upon the issue of rival unionism. Three were refused for non-compliance with the technical provisions of Section 876 (a) of the Civil Practice Act, 3 because of the failure of the contract upon which the action was predicated, and the rest for other reasons. It seems impossible to escape the conclusion that a closed shop contract entered into in good faith will receive the protection of the New York courts, regardless of the fact that it implies the exclusion of a rival union.<sup>82</sup>

### COMPANY UNIONISM

As might be expected, charges of employer domination are not uncommon in rival union disputes.<sup>83</sup> The effect of substantiation

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<sup>80</sup> Indeed, they have gone so far as to order an employer who had moved from New York City in order to evade a labor contract to return. *Dubinsky v. Blue Dale Dress Co.*, 162 Misc. 177, 292 N. Y. S. 898 (1936). See 37 *Michigan Law Review* 320 (1938).

<sup>81</sup> N. Y. L. J., Jan. 27, 1936, p. 480.

<sup>82</sup> Note the positive language of the court in *De Agostina v. Parkshire Ridge Amusement Corp.*, 93 N. Y. L. J. 603 (1934): "Courts do not prescribe an employer's choice between rival labor unions. Having chosen to enter into a 'closed shop' agreement with one labor union to the exclusion of another, an employer's contractual obligations are to be no less observed." The opinion of the Court of Appeals in *Williams v. Quill*, 277 N. Y. 1, 12 N. E. (2d) 547 (1938), would tend further to substantiate the instant conclusion. See also *Murphy v. Higgins*, N. Y. L. J., May 6, 1939, p. 2094.

<sup>83</sup> Such charges were made for example, in *Andear Amusement Corp. v. De Agostina*, N. Y. L. J., Mar. 22, 1934, p. 1380; *Bedford Cleaning and Dyeing Co. v. Kalos*, Kings County Clerk Index 21649 (1933); *Brooklyn United Theatres v. Local 306*, 232 A. D. 828, 248 N. Y. S. 623 (1928); *College Theatre v. Kaplan*, Kings County Clerk Index 10076 (1931); *De Agostina v. Holmden*, 157 Misc. 816, 285 N. Y. S. 909 (1935); *Grow Lunch v. Kramberg*, N. Y. L. J., Nov. 25, 1935, p. 2056; *Regun Operating*

of this charge in two cases<sup>84</sup> has already been described. In others, two decided prior<sup>85</sup> to the enactment of Section 7 (a) of the National Industrial Recovery Act,<sup>86</sup> and three subsequent to its passage,<sup>87</sup> disapproval of employer dominated unionism was noted. Commenting on allegations to that effect, one court intimated that "If this were established at the trial, a court might be well justified in holding that the end sought to be accomplished [inducing breach of contract] is lawful."<sup>88</sup> In only two of the cases, however, was company unionism assigned as a contributing cause to the denial of an injunction against a bona fide union.

On the other hand, the defense of company unionism as justification for attempts to injure a rival was specifically rejected in other cases. Justice May ruled that "whether this latter organization was representative of labor in a general sense is actually beside the question, for under its contract plaintiffs were getting the labor service they needed,"<sup>89</sup> while Justice Black held that, "even if the union with which the plaintiff is under contract is not a bona fide union . . . such union is not a party to this action, nor is it impleaded by defendants, so that inquiry might be made as to its status."<sup>90</sup>

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Co. v. Kaplan, N. Y. County Clerk Index 11378 (1930); *Rosen Bros. v. Mackler*, N. Y. L. J., Mar. 27, 1924; *Schlessinger v. Messing*, N. Y. L. J., Dec. 17, 1924, p. 1059; *United Baker Workers v. Messing*, N. Y. L. J., Feb. 9, 1926, p. 2040; *Esco Operating Co. v. Kaplan*, 144 Misc. 646, 258 N. Y. S. 303 (1932); *Sherman v. Abeles*, 265 N. Y. 383, 193 N. E. 241 (1935).

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<sup>84</sup> *United Baker Workers v. Messing*, N. Y. L. J., Feb. 19, 1926, p. 2040; *Schlessinger v. Messing*, N. Y. L. J., Dec. 17, 1924, p. 1059.

<sup>85</sup> *College Theatre v. Kaplan*, Kings County Clerk Index 10076 (1931), *revd.* 233 A. D. 870, 250 N. Y. S. 759 (1931); *Esco Operating Corp. v. Kaplan*, 144 Misc. 646, 258 N. Y. S. 303 (1932).

<sup>86</sup> 48 U. S. Stat. at Large 198 (1933). For the effect of 7(a) upon the company union, see 34 *Columbia Law Review* 1529 (1934); *Titan Metal Co. v. N. L. R. B.*, 106 Fed. (2d) 254 (1939).

<sup>87</sup> *Sherman v. Abeles*, 150 Misc. 497, 269 N. Y. S. 849, *affd.* 241 A. D. 676, 269 N. Y. S. 864, *revd.* 265 N. Y. 383, 193 N. E. 241 (1935); *De Agostina v. Holmden*, 157 Misc. 816, 285 N. Y. S. 909 (1935); *Hoffmans Vegetarian Restaurant v. Lee*, N. Y. L. J., Jan. 17, 1939, p. 253.

<sup>88</sup> *Esco Operating Corp. v. Kaplan*, 144 Misc. 646, 258 N. Y. S. 303 (1932).

<sup>89</sup> *Brooklyn United Theatres v. Local 306*, Kings County Clerk Index 21662 (1928), *affd.* 248 N. Y. S. 623, *modified* 257 N. Y. 294, 178 N. E. 11 (1931).

<sup>90</sup> *Grow Lunch v. Kramberg*, N. Y. L. J., Nov. 25, 1935, p. 2056.

In view of the frequency with which charges of company unionism have been made, and of the further fact that several prominent dual unions have actually been found to be employer dominated,<sup>91</sup> at least at their inception, the relatively small number of decisions based upon that issue indicates that condemnation of the company union achieved but an uncertain foothold<sup>92</sup> in the common law of rival unionism.<sup>93</sup>

#### NON-INTERVENTION

The *Stillwell* case, embodying a policy of *laissez-faire*, was no sudden sport, but rather the logical formulation of a fairly consistent attitude toward trade unionism entertained by the New York Court of Appeals, expressed by Chief Justice Pound when he wrote: "The Court of Appeals has for many years been disposed to leave the parties to peaceful labor disputes unmolested when economic rather than legal questions were involved."<sup>94</sup> This policy was early applied to rival union disputes. As far back as 1902, Chief Justice Parker, in refusing to extend aid to a union whose existence was threatened by a stronger rival which had informed employers that it

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<sup>91</sup> The United Baker Workers Union was so found in *United Baker Workers Union v. Messing*, N. Y. L. J., Feb. 19, 1926, p. 2040. Likewise, the Allied Motion Picture Operators Union, in *Sherman v. Abeles*, 150 Misc. 497, 269 N. Y. S. 849 (1935). With regard to the Empire State Motion Picture Operators Union, an affidavit of a Mr. Springer, a theatre owner, who was alleged to have had a hand in its formation, is informative: see *2770 Broadway Corp. v. Empire State Union*, Kings County Clerk Index 11305 (1933).

<sup>92</sup> Legislation, however, necessitated modification. The issue of company unionism became a live one as a result of the passage of the New York State Labor Relations Act, chap. 443, Laws 1937. The recent case of *Matter of Campbell v. Picard*, 165 Misc. 148 (1937) is symptomatic of the trend.

<sup>93</sup> The New York courts have never condemned contracts signed with affiliates of the American Federation of Labor. Charges to the effect that employers were using A. F. of L. unions to forestall genuine collective bargaining have been made, nevertheless. See *Municipal Dye Works v. Kalos*, Kings County Clerk Index 21250 (1933); *Nuremberg v. Associated Fur Coat and Trimming Mfrs.*, N. Y. County Clerk Index 20051 (1933); *Westbury Sportswear v. Dubinsky*, Kings County Clerk Index 2975 (1934); *Ansley Radio Corp. v. Carey*, N. Y. L. J., July 22, 1937; *Bedford Cleaning and Dyeing Co. v. Kalos*, Kings County Clerk Index 21649 (1933); *I. J. Fox Corp. v. Gold*, N. Y. County Clerk Index 39400 (1931); *Hoffman's Cafeteria v. Weissman*, Kings County Clerk Index 18293 (1933); *Independent Gas & Electric Union v. Consolidated Edison Co.*, N. Y. County Clerk Index 11767 (1939). In *Bergman v. Levenson*, New York County Clerk Index 8524 (1939), a C. I. O. contract was similarly alleged to be collusive.

<sup>94</sup> *Stillwell Theatre v. Kaplan*, 259 N. Y. 405, 182 N. E. 63 (1932).

was in their best interest to discharge members of the plaintiff association, ruled: "It is clearly within the right [of trade unionists] . . . to insist that protection of life and limb requires that they shall not be compelled to work with men whom they have not seen fit to admit into their organization."<sup>95</sup> Three years later<sup>96</sup> the same court, reversing<sup>97</sup> a previous adverse ruling on the closed shop (there was no question of rival unionism involved) paved the way for a further withdrawal from the economic sphere. This tradition was maintained in the much later cases of *Exchange Bakery v. Rifkin*<sup>98</sup> and *Interborough Rapid Transit Co. v. Lavin*.<sup>99</sup>

Until the *Stillwell* case, however, the Court of Appeals hesitated to apply the liberal principles it had previously adopted to the rival union difficulties that were presented. In *Wilner v. Bless*,<sup>100</sup> picketing and the dissemination of strike information were enjoined because the picketing union had misleadingly proclaimed the existence of a lockout when the employer had merely, at the expiration of a contract, signed with another union. In *Nann v. Raimist*<sup>101</sup> and *Steinkritz Amusement Corp. v. Kaplan*<sup>102</sup> illegal means were again used to bar rival union picketing, enabling the court to sidestep the central issue.

But the facts in the *Stillwell* case cut off this convenient escape. The lower court<sup>103</sup> had failed to find the employment of any but peaceful means, and rested its grant of an injunction upon the allegedly illegal inducement to secure the breach of a contract with a rival union, the purpose for which the *Stillwell Theatre* was being picketed. Furthermore, clarification was sorely needed, if only for

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<sup>95</sup> *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902).

<sup>96</sup> *Jacobs v. Cohen*, 183 N. Y. 207, 76 N. E. 5 (1905).

<sup>97</sup> Whether this constituted an actual reversal of *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297 (1897), is a matter of some controversy. Compare *Witte, op. cit.* at chap. v, n. 1, p. 25, with 95 *American Law Reports* 10 (1935).

<sup>98</sup> 245 N. Y. 260, 157 N. E. 130 (1927).

<sup>99</sup> 247 N. Y. 65, 159 N. E. 863 (1928).

<sup>100</sup> 243 N. Y. 544, 154 N. E. 598 (1926).

<sup>101</sup> 255 N. Y. 307, 174 N. E. 690 (1931).

<sup>102</sup> 257 N. Y. 294, 178 N. E. 11 (1931).

<sup>103</sup> *Stillwell Theatre v. Kaplan*, 249 N. Y. S. 122 (1932).

the guidance of the lower courts.<sup>104</sup> Therefore, facing the issue squarely for the first time, the Court of Appeals vigorously reaffirmed its belief in the wisdom of self-imposed restraint on questions of labor law. Holding that a union, seeking in good faith to secure the betterment of working conditions in an industry by eliminating a rival union which it regards as a harmful influence,<sup>105</sup> may peacefully picket the establishment of an employer contracting with that rival in an effort to induce the employer to breach the contract, the court went on to explain that a ruling to the contrary "would thereby give to one labor union an advantage over another by prohibiting the use of peaceful and honest persuasion in matters of economic and social rivalry. This might strike a death blow to legitimate labor activities. It is not within the province of the courts to restrain conduct which is within the allowable area of economic conflict."<sup>106</sup>

A great deal of comment, both critical and approving, followed the publication of this decision.<sup>107</sup> A searching note in the *Harvard Law Review* indicated both the advantages of this position and the seemingly insoluble contradictions which flowed from it:

The solution reached by the court has practical advantages. It establishes that bona fide efforts to advance the cause of labor will not be enjoined solely because the employer has a contract with a rival union. This avoids the possibility that a company union, thinly disguised as a rival, might provide

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<sup>104</sup> The two unions involved in the Stillwell case, the Empire State Motion Picture Operators Union, Inc., and Local 306, IATSE, had been in court a number of times. *Roosevelt Amusement Corp. v. Empire State Union*, 231 A. D. 872 (1930); *College Theatre v. Kaplan*, 233 A. D. 870, 250 N. Y. S. 759 (1931); *Park Circuit Inc. v. Kaplan*, Kings County Clerk Index 13043 (1930); *Sanders v. Kaplan*, Kings County Clerk Index 385 (1927).

<sup>105</sup> This purpose was first legitimized in *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931), when the court said: "If the defendant believes in good faith that the policy pursued by the plaintiff . . . is hostile to the interests of organized labor, and is likely, if not suppressed, to lower the standards of living for workers in the trade, it has the privilege, by the pressure of notoriety and persuasion, to bring its own policy to triumph."

<sup>106</sup> *Stillwell Theatre v. Kaplan*, 259 N. Y. 405, 182 N. E. 63 (1932).

<sup>107</sup> See "Picketing to Compel Substitution of One Union for Another," 21 *Cornell Law Quarterly* 640 (1936); "Rival Unions," 46 *Harvard Law Review* 125 (1932); 2 *International Juridical Association Bulletin* No. 12, p. 8 (1934); "Procuring Breach of Contract," 84 *American Law Reports* 43 (1933); "When Picketing May Become Unlawful," 7 *St. Johns Law Review* 68 (1932); "Actions Against Labor Unions for Inducing Breach of Contract," 32 *Illinois Law Review* 611 (1938).

an excuse for restraining activities which could be attacked upon no other ground. Furthermore, there may be definite value in measuring the validity of a justification by the bona fides of the pickets, thus eliminating the element of the trial judge's personal opinion. [However], the decision places the employer in a dilemma—he cannot restrain the pickets, yet he will not be permitted to yield to them. Moreover, if the picketing permitted by the decision should result in success for Local 306 [defendant], it is difficult to see how the Empire State Union can be denied the right to picket in retaliation. The majority opinion thus fails to answer the argument that the exhibitor, caught between the cross fire of the two unions, may be destroyed. By retiring from the controversy, the court leaves the public to judge between the two unions. In the ensuing battle of "publicity and persuasion" an overwhelming advantage will lie with the union already established and able to command the resources and man power for an intensive and prolonged campaign.<sup>108</sup>

A better perspective makes it possible to test the perspicacity of these conclusions. It is no doubt true that the employer is often confronted with a seemingly hopeless state of affairs,<sup>109</sup> but it is also true that he is not always the blameless victim of unfortunate circumstance.<sup>110</sup> The misgivings of the above commentator with

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<sup>108</sup> 46 *Harvard Law Review* 125 (1932).

<sup>109</sup> For a good illustration of the employer's dilemma it is necessary to again turn to the moving picture theatre industry. In 1933, the Independent Theatre Owners Association signed a closed shop agreement with the Allied Motion Picture Operators Union, a newly formed group, whereupon Local 306 attempted, by means "going far beyond peaceful picketing and fair argument" to secure the abrogation of this contract. Its efforts were attended with success. The Leffmeyer Corp., a member of the owner's association, discharged the Allied men and hired members of Local 306. Allied immediately instituted suit against Local 306 and also against the Leffmeyer Corp. Referee Marsh decided in *De Agostina v. Holmden*, 157 Misc. 816, 285 N. Y. S. 909 (1935), that the Leffmeyer Corp. should be held to specific performance of the contract, and that picketing should be barred at one of the two theatres it owned. At the other theatre, however, and at the theatres owned by other members of I. T. O. A., Local 306 was to be permitted two pickets, and was also allowed to engage in "other direct attempts to induce the theatre owners to enter into employment contracts, provided they refrain from violence, intimidation, misrepresentation, and other unlawful deceit." Thus the theatre owners were notified that they would not be allowed to break their ten-year contracts with the Allied Union, nor yet secure the removal of the Local 306 pickets. This was confirmed by *De Agostina v. Haruth*, Bronx County Clerk Index 2618 (1935) and *De Agostina v. Leff Theatres Inc.*, N. Y. L. J., Jan. 27, 1936, p. 980, although in the latter case the severity of the sentence was mitigated by postponing the execution of the order.

<sup>110</sup> It was brought out in the testimony in the Stillwell case that plaintiff had, at the expiration of a contract with Local 306, signed a contract with the Empire State Union enabling it to pay lower wages for longer hours worked, presumably fully aware of the consequences which would flow from that act. In the illustration given in note 109 *supra*, there is reason to believe that the Allied Union was being used to depress standards, and that the situation described was deliberately created. Justice Collins, in *Sherman v.*

regard to the overwhelming and impliedly socially harmful<sup>111</sup> advantages enjoyed by a well entrenched union are not entertained by close students of the labor movement.<sup>112</sup> His belief in the efficacy of the internal test of *bona fides* for eliminating judicial preconception, is difficult to share.<sup>113</sup> In the last analysis, there must continue to be ample scope for the play of opinion in the classification of motives.

It is clear that the *Stillwell* dictum presents no final or invariable answer to the problems that arise when unions fight among themselves, particularly in view of the later labor relations statutes. The incongruity of permitting picketing, on the one hand, and of guaranteeing the failure of the picketing to achieve the purpose for which it is instituted must ultimately be resolved by weighing the relative social importance of unrestricted picketing and of the collective agreement. The courts will eventually be obliged to balance the politically powerful demands of labor unions for freedom from judicial restraint over and against the necessity of preserving existing employment relationships from the disruption attendant upon rival union warfare. These are questions of policy, as the Court of Appeals was well aware, and must be recognized as such to be dealt

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Abeles, 150 Misc. 497, 269 N. Y. S. 849 (1935) said of the Allied Union: "The attorney for Association had a hand in Allied's formation. Another attorney who has acted for Allied is a son of the former business manager of Association. Allied's dues were collected through or at the offices of the Association. For a period, Allied's offices were at the premises occupied by Association. The recording secretary of Allied is a brother of the president of Association . . . . The above uncontradicted facts, supported mainly by documentary evidence, support the charge that Allied is a 'company union'. The liaison is boldly delineated; the rivet obtrudes."

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<sup>111</sup> "Recent developments closely intertwined with the career of Local 306 have led many to question how well society and organized labor itself are served by unions so firmly entrenched." 46 *Harvard Law Review* 125 (1932).

<sup>112</sup> See Carrol R. Daugherty, *Labor Problems in American Industry* (New York, 1938), 4th ed., p. 492; Norman J. Ware, *Labor in Modern Industrial Society* (New York, 1935), p. 41.

<sup>113</sup> E. g., Justice Rosenman, in *Edjomac Amusement Corp. v. Empire State Union*, 156 Misc. 856, 288 N. Y. S. 756 (1935), refused to find *bona fides* because "no evidence was proffered by the defendant from which such desire or actuating motive might be inferred." In *Westbury Sportswear Co. v. Dubinsky*, Kings County Clerk Index 2975 (1934) the International Ladies Garment Workers Union was restrained from picketing the United Textile Workers despite its sworn belief that the latter "was not dealing with its members in such a way as to promote the interests of organized labor."

with effectively. At any rate, it is not surprising, in view of the ensuing difficulties, that the courts of other jurisdictions have generally failed to agree with the New York Court of Appeals in this matter.

The ability of lower New York courts to distinguish the Stillwell doctrine into nullity has already been remarked.<sup>114</sup> The ground for granting relief merely shifts from the no longer available illegal procurement of contract breach to readily found illegal means.<sup>115</sup> But it is undeniable that the firm declaration by the high court of New York, whatever its intrinsic merit, has led to a fuller consideration and better, if not more sympathetic, understanding of the motives which prompt unions to drive competitors from the labor market.<sup>116</sup>

### CONCLUSIONS

The foregoing review has indicated three general types of approach which the New York courts have adopted—the *laissez-faire* policy of the Court of Appeals, the restrictive policy of the majority of lower courts, and the more affirmative procedure, akin in many ways to that which we have come to associate with quasi-judicial labor boards, followed by a minority of lower courts. Which of these three methods has proved most successful can only be determined with reference to specific disputes. The public policy of the State of New York favors, at present, the continued theoretical dominance of the principles set forth by the New York Court of Appeals, while the State Labor Relations Act<sup>117</sup> has established an agency that bids fair to supplant courts of equity insofar as investigation into the facts of labor disputes is concerned. But the courts, through their final enforcement power, will be obliged to scrutinize each case carefully. Whether or not they will continue to abstain from taking an active role in matters affecting trade unions, particularly in view of the conflict within the labor movement itself, is still a matter for conjecture.

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<sup>114</sup> *Supra*, p. 76.

<sup>115</sup> *Rosekay Amusement Co. v. Holmden*, N. Y. L. J., Sept. 10, 1934, p. 691. See also the cases cited *supra*, notes 33, 34, 35.

<sup>116</sup> In *De Agostina v. Holmden*, 157 Misc. 816, 285 N. Y. S. 909 (1935), for example, Referee Marsh reviewed the entire history of industrial relations in the industry in which the dispute occurred.

<sup>117</sup> Laws of 1937, C. 433, discussed *infra*.

## THE COMMON LAW OF RIVAL UNIONISM IN OTHER JURISDICTIONS

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It would be interesting to search the records of the lower courts of states other than New York for rival union cases, in order that detailed comparison might be made. But valuable as the results might prove, such a quest is not practicable here.<sup>1</sup> All that can be attempted is a brief summary of the decisions that have been reported and digested. Nevertheless, since these in the main represent the viewpoint of the higher courts, they may serve as a significant if not always adequate contrast to the views held by the New York Court of Appeals, and at the same time reveal the prevailing trend of judicial thought with some degree of accuracy.<sup>2</sup>

Only the courts of Missouri so widened the "allowable area" as to include attempts to breach existing contracts held by rival unions. The conclusions reached in *Church Shoe Co. v. Turner*<sup>3</sup> were strikingly similar in some respects to those already noted in *Stillwell Theatre v. Kaplan*.<sup>4</sup> Granting that "it is unlawful for a disinterested third party . . . to seek to compel the breaking of a contract entered

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<sup>1</sup> See *supra*, chap. vi, n. 1.

<sup>2</sup> The decisions of the courts of Pennsylvania, Ohio, Illinois, Massachusetts, New Jersey, Michigan, Indiana and California will be treated in somewhat greater detail than those of the courts of other states. According to the 1935 Biennial Census of Manufactures, these eight states, together with New York, contained 61% of the manufacturing wage earners securing 69% of the national wage bill and producing 70% of the total national value added by manufactures. If the not untenable assumption that injunction suits are roughly proportional to manufacturing population is accepted, study of these states will evidently yield results not subject to great distortion from sampling inadequacy.

Modifications in the common law induced by recent legislation dealing with labor will be treated separately. Stated conclusions, however, are to be regarded as subsisting law unless otherwise noted.

<sup>3</sup> 218 Mo. App. 516, 279 S. W. 232 (1926). Plaintiff had entered into a contract with the Boot and Shoe Workers Union. Defendant, the United Shoe Workers of America, claiming to represent a majority of plaintiff's employees, picketed plaintiff's factory.

<sup>4</sup> 259 N. Y. 405, 182 N. E. 63 (1932).

into between an employer and its employees," the court went on to declare that

no case has been called to our attention, nor has our search disclosed one, in which employees, former (as defendants were) or expectant, are placed in the same category as disinterested parties . . . . We think it is clear, therefore, that defendants . . . were within their rights insofar as they attempted peaceably to persuade plaintiff's employees . . . either to leave or not to enter its employ, even though the ultimate effect of such conduct should be the breaking of the contract entered into between plaintiff and the Boot and Shoe Workers Union.<sup>5</sup>

When read in conjunction with an earlier Missouri case,<sup>6</sup> wherein a union's plea to restrain the operation of a closed shop agreement between an employer and its rival was denied, a tentative policy of abstention is clearly discernible.<sup>7</sup>

Similar but less drastic expressions are to be found in a few scattered decisions. Lower courts in Ohio<sup>8</sup> and Pennsylvania<sup>9</sup> have refused the aid of equity to unions seeking to repel the attacks of rivals. The Texas Court of Civil Appeals declined to interfere with a preferential shop contract between the Texas and Pacific Railway Co. and the Brotherhood of Railway Trainmen at the behest of the Switchmen's Union, holding that the rights of plaintiff were not curtailed, since the contract did not establish a monopoly.<sup>10</sup> The Connecticut Supreme Court of Errors refused to enjoin peaceful picketing where employees, refusing to join a rival labor organiza-

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<sup>5</sup> Church Shoe Co. v. Turner, 218 Mo. App. 516, 279 S. W. 232 (1926).

<sup>6</sup> United Shoe Workers Union v. Brown Shoe Co. and Boot and Shoe Workers Union, St. Louis, Mo., March 1914, *A. F. L. Weekly News Letter*, Apr. 4, 1914.

<sup>7</sup> See, however, a still earlier decision, Swaine v. Blackmore, 75 Mo. Ap. 74 (1898), in which it was held that members of a labor organization might be enjoined from procuring the discharge of members of a rival organization by threats and intimidation. Also, Hughes v. Motion Picture Operators Union, 282 Mo. 304, 221 S. W. 95 (1920) for an example of restriction in another matter.

<sup>8</sup> Graves v. McNulty, 13 Ohio N. P. N. S. 110 (1912). The court here held that workmen might strike to obtain the discharge of members of rival unions. "If it be said the motive is an evil one, the answer is, that it is an attempt to force the consolidation of labor interests by strengthening organization. This can not be an evil, unless labor unions are unlawful combinations."

<sup>9</sup> National Hod Carriers Union v. Murry, 62 Pitts. 617 (1914), 5 C. R. A. (Pa. Digest 1894).

<sup>10</sup> Underwood v. Texas & Pacific Railway Co., 178 S. W. 39 (Tex. 1915).

tion with which their employer had signed a closed shop agreement, went out on strike and substantially reduced the volume of the employer's business.<sup>11</sup> Finally, the Supreme Judicial Court of Massachusetts has twice<sup>12</sup> upheld the right of a union to seek a closed shop contract at the expense of a rival, although in neither case was the more questionable privilege of inducing a breach of collective contract presented.<sup>13</sup>

With these exceptions, however, the courts of the several states have assumed the obligation of intervening in rival union disputes in order to rectify situations damaging to the parties concerned—the employer and the contesting unions. The manner in which the power of equity has been exercised to this effect can best be illustrated by an enumeration of pertinent cases according to jurisdiction.

The Supreme Judicial Court of Massachusetts has been obliged, on several occasions in addition to those already noted,<sup>14</sup> to cope with rival unionism. An early case involved the request of a painters' union for a closed shop, seconded by threats of a strike and addressed to the boss painters of the locality. If granted, it would have entailed the discharge of rival union men by these employers. The latter union brought suit to restrain this conduct. The court held that "the right involved is the right to dispose of one's labor with full freedom. This is a legal right, and it is entitled to legal protection," and concluded:

The defendants might make such lawful rules as they please for the regulation of their own conduct, but they had no right to force other persons to join them. The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared

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<sup>11</sup> *E. M. Loew's Enterprises v. International Alliance*, 6 Atl. (2d) 321 (Conn. 1939).

<sup>12</sup> *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 (1906); *Hoban v. Dempsey*, 217 Mass. 166, 104 N. E. 717 (1914). In the former case, the necessity for competition was regarded as justification sufficient to rebut claims for injury sustained by plaintiff as a result of alleged interference with employment. The latter case upheld the right of a union to secure a closed shop agreement to the exclusion of a rival.

<sup>13</sup> Dr. Witte's statement (Witte, *op. cit.* at chap. v, n. 1, p. 26) to the effect that "Strikes for the discharge of non-unionists or of members of rival unions have been sustained by the highest courts in Arkansas, California, Indiana and Oklahoma, and by the Supreme Court of the District of Columbia" does not seem to be borne out with respect to "members of rival unions" by the cases he cites in support.

<sup>14</sup> *Supra*, n. 12.

with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendant under the shelter of the principles of trade competition.<sup>15</sup>

An injunction was granted, prohibiting interference with the employment of plaintiff.<sup>16</sup>

Similar complaints were brought in *Bogni v. Perotti*,<sup>17</sup> *Fairbanks v. McDonald*,<sup>18</sup> and *Pickett v. Walsh*.<sup>19</sup> In all but the last,<sup>20</sup> substantially similar conclusions were reached,<sup>21</sup> the court indicating that unions might "say to their employers, 'you must give us all your work or none of it' . . . without exceeding the limits of allowable competition," but that they could not lawfully "require their employers to refuse absolutely to employ the plaintiffs, for the purpose of putting upon the latter an unfair pressure."<sup>22</sup>

The Massachusetts high court has never sanctioned union activities intended to procure breach of a collective contract held by a rival. Strikes and picketing to that end have been condemned,<sup>23</sup> as well as

<sup>15</sup> *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011 (1900).

<sup>16</sup> *Idem*. Chief Justice Holmes, in a famous dissent, argued that the motive of strengthening the organization constituted sufficient justification for interference despite his belief that "Organization and strikes may get a larger share for the members of an organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring mass."

<sup>17</sup> 224 Mass. 152, 112 N. E. 853 (1916).

<sup>18</sup> 219 Mass. 291, 106 N. E. 1000 (1914).

<sup>19</sup> 192 Mass. 572, 78 N. E. 753 (1906).

<sup>20</sup> The court was able to distinguish this case from *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011 (1900), by holding that in the latter, the conduct restrained as unlawful was the attempt to force outsiders to join defendant union, whereas in the case at bar there was no attempt to force adhesion, but only competition for the work done. These cases afford a good example of the contradictory results springing from a primary emphasis upon motivation. See Sayre, "Labor and the Courts," 39 *Yale Law Journal* 682 (1930); Note, 45 *Harvard Law Review* 1226 (1932).

<sup>21</sup> In *Fairbanks v. McDonald*, 219 Mass. 291, 106 N. E. 1000 (1914), the court found that the defendant "acted from malice towards the plaintiffs, and did to them an unlawful injury, by causing their exclusion from the labor market." The case of *Bogni v. Perotti* is notable in that the plaintiff was General Laborers Industrial Union No. 324, of the Industrial Workers of the World. There, threats of a sympathetic strike were specifically enjoined.

<sup>22</sup> *Fairbanks v. McDonald*, 219 Mass. 291, 106 N. E. 1000 (1914).

<sup>23</sup> *Tracey v. Osborne*, 226 Mass. 25, 114 N. E. 959 (1917); *Goyette v. Watson*, 245 Mass. 577, 140 N. E. 285 (1923). In the former case, the plaintiff was the United Shoe Workers Union and the defendant the Lasters Protective Association of Lynn, while in the latter plaintiff and defendant were, respectively, the Boot and Shoe Workers Union and the Shoe Workers Protective Union.

activities "obstructing, threatening, intimidating or interfering with"<sup>24</sup> the members of a rival engaged in the performance of an agreement. A recent opinion by the same court, denying the use of peaceful means in furtherance of attempts to oust a rival union, turned upon the oft-rejected ground<sup>25</sup> that when a strike, with the successful replacement of the strikers, "has become merely nominal, without substantial effect upon the business of the employer or genuine hope of success, continued acts of interference with business can no longer be justified as lawful incidents of an existing strike."<sup>26</sup> It is apparent that the Supreme Judicial Court of Massachusetts, in its conception of the "allowable area" within which rival unions may unmolestedly operate, stands at the opposite pole from the New York Court of Appeals.

The Pennsylvania courts have consistently asserted their belief in the wisdom of restricting the use of ordinary labor weapons by rival unions. As far back as 1903,<sup>27</sup> a comprehensive decree restrained the Allied Building Trades of Philadelphia from interfering with the employment of members of the rival Plumbers League of the City of Philadelphia, on the several grounds of illegal means, unlawful purpose, unjustifiable invasion of plaintiff's rights, and conspiracy.<sup>28</sup> More recently the Superior Court, while indicating the advisability of judicial abstention from labor controversy,<sup>29</sup> and

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<sup>24</sup> *Goyette v. Watson*, 245 Mass. 577, 140 N. E. 285 (1923).

<sup>25</sup> See *Jefferey-DeWitt Insulator Co. v. National Labor Relations Board*, 91 Fed. (2d) 134 (1937); *National Labor Relations Board v. Carlisle Lumber Co.*, 99 Fed. (2d) 533 (1938), concurring opinion of Judge Stephens. In these cases it was pointed out that the striking employee had occupied a status distinct from that of a disinterested third party even in the absence of statutory definition. See also Comment, 122 *American Law Reports* 1292 (1939).

<sup>26</sup> *Hertzig Corp. v. Gibbs*, 3 N. E. (2d) 831 (Mass. 1936).

<sup>27</sup> *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327 (1903).

<sup>28</sup> A lower Pennsylvania court took similar action the next year, in *House Painters Beneficial Association v. Feeny* (Brotherhood of Painters), 13 Pa. Dist. Rep. 335 (1904).

<sup>29</sup> "The basic problem involved, being the settlement of a wage dispute, is economic rather than legal. Being of this nature this court cannot settle 'the multitude of questions which agitate the public mind'. No scheme in itself comprehensively sufficient has been legislatively evolved to meet like situations that has not run counter to some constitutional inhibition. It is well that judges, burdened with administering the law, should not be compelled to embark in another field of effort in which they, as a rule, are not

going so far as to hold peaceable picketing an absolute right,<sup>30</sup> affirmed an inferior court ruling to the effect that efforts of the United Mine Workers of America to displace members of the United Anthracite Miners of Pennsylvania, a rival, constituted an unlawful purpose.<sup>31</sup> To quote from the lower court opinion approvingly cited:

. . . their purpose was to [force] plaintiffs to leave the new union and adhere to the old [defendant] union, and in so doing, they exceeded their rights under the law . . . . A person may work for whom he pleases, at the particular wages he pleases, and as to this right no association of men can lawfully interfere . . . . Neither the defendant unions, their officers, members or any other person has the right to interfere with the plaintiffs in their employment or to combine to prevent them or any of them from obtaining work . . . by acts of violence, intimidation or threats of a strike . . . . The right of acquiring property, inherent and indefeasible in every man, includes the right of a workman to work when, where and for whom he pleases and is, in a legal sense, property entitled to the protection of the law.<sup>32</sup>

The attitude of the Pennsylvania Superior Court is not so clear cut as that of the Massachusetts high court. In the case cited immediately above, emphasis was placed upon the illegality of the means used to accomplish the purpose. However, since "threats of a strike" were regarded as intimidatory and unlawful, it would seem not incorrect to infer that a strike and acts incident thereto might be subject to a similar interpretation when employed in pursuance of an identical object. Read in conjunction with the ban on picket-

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skilled; nor have they had the advantage of previous training therefor." Justice Kephart in *Jefferson & Indiana Coal Co. v. Marks*, 287 Pa. 171, 134 Atl. 430 (1926).

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<sup>30</sup> *Kirmse v. Adler*, 311 Pa. 78, 166 Atl. 566 (1933). Two years prior to this decision, union activities were enjoined on the basis of "yellow-dog" contracts in *Kraemer Hosiery Co. v. American Federation of Full Fashioned Hosiery Workers*, 305 Pa. 206, 157 Atl. 588 (1931). More recently Judge Musmanno, of the Court of Common Pleas, eloquently held that "Picketing is a concomitant of the right to organize . . . . To say that workingmen have the right to organize and to form labor unions, and then deny them the right to picket when they are offended, is equivalent to authorizing a watchman to carry a whistle but to prohibit him from blowing it. Picketing is the articulation of the workingman's protest. Picketing differs only in *form* from free speech, a right guaranteed by the constitution. Picketing is peripatetic free speech . . . ." *Commonwealth ex. rel. Harris*, C. C. H. Labor Law Service par. 16,112 (1935).

<sup>31</sup> *Mische v. Kaminski*, 127 Pa. 66, 193 Atl. 410 (1937). Accord: *Dorrington v. Manning*, 4 Atl. (2d) 886 (Pa. 1939).

<sup>32</sup> *Idem*.

ing in the *Kraemer* case,<sup>33</sup> where inducing the breach of an individual contract was at issue,<sup>34</sup> it will be seen that the Pennsylvania courts have tended to concur in the restrictive policy of the Massachusetts court with respect to the extent of the permissive area.<sup>35</sup>

Several Illinois decisions offer material from which to predict the degree of freedom that will be allowed rival unions there. An early case resulted in the rule that attempts to compel the discharge of members of a rival union would not be tolerated, although the means employed were legal per se.<sup>36</sup> In a later case, a strike to secure the discharge of non-union men was permitted to proceed without judicial intervention,<sup>37</sup> but attempts by an outside union to unionize an establishment were held to constitute unwarranted interference with the rights of the employer.<sup>38</sup> A strike growing out of a jurisdictional dispute and in violation of an arbitration agreement was enjoined;<sup>39</sup> but *peaceful* picketing,<sup>40</sup> even where the union had no members in the picketed establishment,<sup>41</sup> was held lawful. In a

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<sup>33</sup> *Kraemer v. American Federation of Full Fashioned Hosiery Workers*, 305 Pa. 206, 157 Atl. 588 (1931).

<sup>34</sup> However, the Pennsylvania Labor Anti-Injunction Act, Act No. 308, Laws of 1937, amended 1939, Section 5, forbids further relief on this ground.

<sup>35</sup> The recent decision of *Yale Knitting Mills v. Knitgoods Workers Union*, 5 Atl. (2d) 323, 334 Pa. 23 (1939) serves to confirm this conclusion.

<sup>36</sup> *Chicago Federation of Musicians v. American Musicians Union of North America*, 139 Ill. App. 65 (1908). The defendant had fined one of its members, a musical conductor, for conducting an orchestra which numbered among its personnel several members of the complaining union.

<sup>37</sup> *Kemp v. Division 241*, 255 Ill. 213, 99 N. E. 389 (1912). In this case, strengthening the union was conceded to be a lawful purpose, for "Without organization, the workmen would be utterly unable to make a successful effort to maintain or increase their wages or to enforce such demands as have been held to be proper."

<sup>38</sup> *Nusbaum v. Retail Clerks Protective Association*, 227 Ill. App. 206 (1922).

<sup>39</sup> *Preble v. Architectural Iron Workers Union*, 260 Ill. App. 435 (1931).

<sup>40</sup> *Fenske Bros. v. Upholsterers International Union*, 358 Ill. 239, 193 N. E. 112 (1934); *Rosen v. United Shoe and Leather Workers Union*, 287 Ill. App. 49 (1936).

<sup>41</sup> *Schuster v. International Association of Machinists*, 12 N. E. (2d) 50 (Ill. App. 1937). The Illinois Anti-Injunction Law, though relied upon, was not entirely controlling, the court holding that "Members of a union might without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

recent opinion, however, the Illinois Supreme Court, by approving an Appellate Court decision to the effect that "peaceful picketing by strangers (persons not employed or previous or expectant employees) is prohibited by law,"<sup>42</sup> gave clear indication of its probable approach to rival unionism.

Ohio courts, on the whole, have been conservative in developing a common law of labor. Picketing in the absence of a legitimate labor dispute is apparently illegal.<sup>43</sup> Inducing breach of contract will be enjoined<sup>44</sup> though the inducer acts in good faith.<sup>45</sup> Even the closed shop is illegal if it tends, through the creation of a monopoly, to interfere with the employment of non-union men.<sup>46</sup> A lower court injunction recently issued at the behest of a union temporarily restrained a rival "from engaging in any acts of intimidation, force and violence or from threatening or intimidating or using force and violence against the members of said plaintiff association."<sup>47</sup> These precedents tend to confirm the accuracy of the statement that

A union will not be enjoined from threatening to strike or quit employment in a body, where the members of the rival union are either at work or have been promised employment. The legality of a strike in such a case, however, would seem to depend upon its purpose. If it is only a contest between rival unions, the validity of the strike would seem very doubtful and injunction might issue.<sup>48</sup>

<sup>42</sup> *Swing v. American Federation of Labor*, 18 N. E. (2d) 258 (1939). The lower court in this case had criticized the *Schuster* decision.

<sup>43</sup> *Markowitz v. Retail Dry Cleaners Union*, 3 Oh. Op. 366 (1935); *Savoy Realty v. McGee*, 4 Ohio Op. 88 (1935); *Mutual Benefit Life v. McGee*, 4 Oh. Op. 99 (1935); *La France v. Electrical Workers*, 108 O. S. 61 (1923); *Saltzman v. United Retail Employees Union*, Court of Common Pleas, C. C. H. Labor Law Service par. 18,042 (1937); *White-Allen Chevrolet Co. v. Auto Mechanics Union*, 27 Ohio Law Abstracts 273 (1938). See, however, *Crosby v. Rath* (Ohio Dist. Ct. of Appeals: 1939), C. C. H. par. 18,365, where peaceful picketing of a non-union employer was permitted.

<sup>44</sup> *Parker v. Bricklayers Union*, 10 Ohio Dec. Rep. 458, *affd.* 51 O. S. 603 (1899); *United Tailors v. Amalgamated Workers*, 26 Ohio N. P. N. S. 436 (1927); *Williams v. United Shoe Workers of America*, Ohio Court of Common Pleas, C. C. H. Labor Law Service par. 18,024 (1937).

<sup>45</sup> *Fulworth v. International Ladies Garment Workers Union*, 15 Ohio N. P. N. S. 353, 27 Oh. D. N. P. 675 (1914); *Frankel Chevrolet v. Meerchaum*, 27 Ohio Law Abstracts 425 (1938).

<sup>46</sup> *Scaggs v. Transport Workers Union*, C. C. H. par. 18,357 (Ohio App. Ct. 1939).

<sup>47</sup> *Barr Employees Association v. United Rubber Workers Union*, C. C. H. par. 16,020 (Ohio. Com. Pleas 1934).

<sup>48</sup> 24 *Ohio Jurisprudence* 692.

The common law of labor disputes in New Jersey is, in general, like that of Ohio. The Court of Errors and Appeals of New Jersey has approved stringent rules as to permissible activities adopted by the judges of the Court of Chancery.<sup>49</sup> Strikes and picketing for the closed shop,<sup>50</sup> to obtain unionization,<sup>51</sup> and in the absence of a labor dispute<sup>52</sup> have been condemned as going beyond the bounds of proper conduct. The decisions cited regard motive and purpose as of prime importance, relegating consideration of the means to a secondary position, and thus offering a convenient background for the prohibition of all union activities, whether peaceful or not, the object of which is regarded as unjustified by the presiding chancellor.

A striking illustration of the way in which rival unionism may lead to the grant of injunctive relief when it is accompanied by emphasis upon motive and purpose may be found in the New Jersey case of *Restful Slipper Co. v. United Shoe & Leather Workers Union*.<sup>53</sup> After hearing an application for a temporary injunction against picketing supported by plaintiff's allegation that "its employees in the Jersey City plant are not, and have not been, affiliated with the defendant United Shoe and Leather Workers Union Local

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<sup>49</sup> *Feller v. International Ladies Garment Workers Union*, 191 Atl. 111 (N. J. 1937).

<sup>50</sup> See cases cited at 4 *International Juridical Association Bulletin* No. 11 (a) (1936), p. 4, footnote 12. Also *Wasilewski v. Bakers Union*, 118 N. J. Eq. 349 (1935); *International Ticket Co. v. Wendrich*, 122 N. J. Eq. 222, 193 Atl. 808 (1937); *Canter's Sample Furniture House v. Retail Furniture Employees Local No. 109*, 122 N. J. Eq. 575 (1937); *Dolan Dining Co., Inc. v. Cooks and Assistants Union*, 4 Atl. (2d) 5, 124 N. J. Eq. 584 (1938).

<sup>51</sup> *Feller v. International Ladies Garment Workers Union*, 191 Atl. 111 (1937); *Mannheim Manufacturing Co. v. International Ladies Garment Workers Union*, 4 *I. J. A. Bul.* No. 11(a) (1936), p. 4, footnote 11; 218-220 *Market St. Corp. v. Delicatessen and Cafeteria Workers Union*, 118 N. J. Eq. 448, 179 Atl. 689 (1935); *Good Foods Inc. v. Loupos, C. C. H.* par. 18,475 (N. J. Eq. 1939).

<sup>52</sup> *Feller v. International Ladies Garment Workers Union*, 191 Atl. 111 (1937): "The single question presented in this case is likewise whether a labor organization may picket the business plants of the complainants where no strike exists for the purpose of inducing their employees to leave their employment and join the defendant union. The answer in the court below was in the negative, and we think the same answer must be given here . . . the answer filed . . . presents no justification for the action by strangers through picketing, persuasion or solicitation to induce employees to leave the service of their employers."

<sup>53</sup> 116 N. J. Eq. 521, 174 Atl. 543 (1934).

23 or with any other union or organization,"<sup>54</sup> Vice Chancellor Egan declared: "Certainly a dispute exists in the instant case; the facts presented by the affidavits clearly demonstrate that it exists between complainant's employees, or some of them, and the complainant. That being the case, the defendants have a right to peacefully picket."<sup>55</sup> The defendant union took the matter before the "New York Regional Labor Board," which ordered reinstatement of defendant's members according to the terms of a previous contract. In defiance of this mandate, the Restful Slipper Co. negotiated an agreement with the Boot and Shoe Leather Workers Union, a rival to the United, and affiliated with the American Federation of Labor. When the United Union resumed picketing, Vice Chancellor Egan modified the injunction to prohibit all picketing "upon the grounds that the signs carried by the pickets were false and misleading,<sup>56</sup> that disorder or breach of the peace was likely to result if the picketing were to continue, and that, *because of the existing contract with the A. F. of L. union, further picketing would serve no useful and just purpose and was not sanctioned by the statute.*"<sup>57</sup> [italics mine]

Similar conclusions were reached in *Jordan's Wearing Apparel v. Retail Sales Clerks Union of New Jersey*. In granting a petition asking for the restraint of picketing, Vice Chancellor Stein said:

If the *purpose* as declared by defendants originally was organization of the complainant's employees for collective bargaining in order to bring about betterment in conditions of hours, wages, and labor, that result has been accomplished. If the *purpose* was to compel an agreement with the defendant union to the exclusion of any other union, the *purpose* of collective bargaining must be regarded as secondary, and to this we do not believe that even the defendants will subscribe. *If it be the purpose of the defendant to close complainant's establishment to all union employees not members of its union (the closed shop), that purpose was unlawful. Certain it is that complain-*

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<sup>54</sup> *Idem*. Plaintiff's was a "runaway" shop. It had contracted with defendant union in New York City, but moved to New Jersey to evade the contract.

<sup>55</sup> *Idem*.

<sup>56</sup> "The signs carried read, 'The Slipper Workers In This Building, No. 31 Wilkinson Ave., Fight Against Union Labor. Help Us Win Our Fight' and 'Slipper Workers Employed by This Firm Are Fighting for Union Recognition and Better Living Conditions.' Both signs bore the name 'United Shoe and Leather Workers Union'." 3 *I. J. A. Bulletin* No. 10 (1935), p. 5, footnote 2.

<sup>57</sup> 3 *I. J. A. Bulletin* No. 10 (1935), p. 5.

*ants are caught in an apparent strife between unions for supremacy.*<sup>58</sup> [italics mine]

If the New Jersey Court of Errors and Appeals concurs in this approach, and there is nothing in its previous decisions to indicate a contrary result,<sup>59</sup> the labor unions of New Jersey will continue to find themselves unable to employ effective measures designed to combat rivals and secure hegemony in their respective industries.

With respect to the attitudes toward rival unionism which the courts of Michigan, California, and Indiana have adopted, it may be said that the two first-named have tended to be conservative, and the latter liberal, in extending to labor the right to wage economic warfare. In Michigan, peaceful picketing, even when accompanying a labor dispute, has been repeatedly declared unlawful by the Supreme Court,<sup>60</sup> and it can be expected that little leeway will be allowed in rival union disputes.<sup>61</sup> The California courts have likewise been prone to restrict the concomitant acts of a strike.<sup>62</sup> Steps

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<sup>58</sup> 193 Atl. 806 (1937). The facts, briefly, were given as follows: A strike was called by the Retail Clerks Union of New York, affiliated with a "New Era" A. F. of L. union, and subsequently chartered by the C. I. O. Non-striking employees joined the Retail Clerks International Protective Association, Local No. 115A, affiliated with the A. F. of L., and plaintiff signed a contract with this group. It was on the basis of this contract that plaintiff sought to enjoin picketing.

<sup>59</sup> The more liberal viewpoint with regard to labor law adopted by the Court in *Bayonne Textile Corp. v. American Federation of Silk Workers*, 172 Atl. 551 (1934) under the stimulus of the moral atmosphere prevailing at the inception of the National Industrial Recovery Act, was abandoned in the subsequent cases of *Feller v. International Ladies Garment Workers Union*, 191 Atl. 111 (1937) and *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, 199 Atl. 598 (1938). A ray of hope appears, however, in the reversal of four *ex parte* stays of lower courts because of the insufficiency of the evidence. 5 Labor Relations Reporter 244 (1939).

<sup>60</sup> *In re Langell*, 178 Mich. 305, 144 N. W. 841 (1914) (picketing here was admittedly peaceful); *Enterprise Foundry Co. v. Iron Molders Union*, 149 Mich. 31, 112 N. W. 685 (1907); *Clarage v. Luphringer*, 202 Mich. 612, 168 N. W. 440 (1918); *Baltic Mining Co. v. Circuit Judge*, 177 Mich. 632, 144 N. W. 209 (1913); *Schwartz v. Cigar Makers International Union*, 219 Mich. 589, 189 N. W. 55 (1922). See also the recent case of *Stearns & Co. v. U. M. W. A.*, 5 Labor Relations Reporter 188 (Mich. Cir. Ct. 1939).

<sup>61</sup> The recently enacted Michigan Labor Relations Act, discussed *infra*, p. 146, may prove even more restrictive than the court decisions theretofore.

<sup>62</sup> *Goldberg, Bowen & Co. v. Stablemens Union*, 149 Cal. 429, 86 Pac. 806 (1906); *Rosenberg v. Retail Clerks Association*, 39 Cal. App. 67, 177 Pac. 864 (1918) ("The weight of authority is . . . to regard picketing as inherently illegal"); *Southern California Iron and Steel Co. v. Amalgamated Association*, 186 Cal. 605, 200 Pac. 1 (1921).

in the direction of liberalism<sup>63</sup> were rudely interrupted by reversion to the common practice of distorting the purpose of labor legislation when a District Court of Appeals ruled that picketing by an outside union for the purpose of securing the membership of the employees was illegal in intent under the terms of an anti-yellow-dog statute.<sup>64</sup> In the same opinion, the court gratuitously announced that "advertising one to be unfair to organized labor when the sole controversy is between conflicting factions of labor organizations in which the employer takes no part" constituted an unlawful purpose, picketing in pursuit of which would be enjoined. The Supreme Court of California has not yet ruled on the question.

The Supreme Court of Indiana seems to have adopted a more progressive view with respect to the purposes for which picketing and strikes may be undertaken in holding that "It is now generally recognized that employees have a legitimate de facto interest in collective action for the purpose of improving their economic situation.

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<sup>63</sup> *Lisse v. Local Union, Cooks, Waiters and Waitresses*, 2 Cal. (2d) 312, 41 Pac. (2d) 314 (1935). In this case, apparently for the first time, the California high court recognized that peaceful picketing is not necessarily unlawful per se. Also, *Matter of Lyons*, C. C. H. par. 18,199 (Cal. App. 1938) (peaceful picketing held part of the rights of freedom of speech and press).

<sup>64</sup> *McKay v. Retail Salesmen's Local Union*, 89 Pac. (2d) 426 (1939). The statute in question made it a misdemeanor for any person to coerce another "to enter into an agreement, written or verbal, not to join or become a member of any labor organization as a condition of securing employment or continuing in the employment." The court inferred from this that since "the complainant here alleges that the purpose of the picketing is to compel the employer to sign a contract whereby it will force the plaintiffs to agree not to join or remain a member of a labor organization of their own choosing, we see that the acts complained of are acts designed to force the employer to commit a crime denounced by the statute." *Accord*: *Bowers v. California Milling Corporation*, 3 Labor Relations Reporter 725 (Super. Ct. 1939); *E. H. Renzel & Co. v. Warehousemen's Union*, (Dist. Ct. of Appeals: 1939), C. C. H. par. 18,340; *Smith Metropolitan Market Co. v. Lyons*, (Dist. Ct. of Appeals: 1939), C. C. H. par. 18,341; *Whitney & Co. v. Lydich*, (Super. Ct. 1938), 3 Labor Relations Reporter 628; *Elm Oil Co. v. Oil Workers Union*, 4 Labor Relations Reporter 945 (Super Ct. 1939); *Allen v. Amalgamated Meat Cutters*, C. C. H. par. 18,031 (Super. Ct. 1937). *Contra*: *Barraclough v. Local Joint Executive Board*, (Super. Ct. 1938), 3 Labor Relations Reporter 172; *Boyd v. Lumber Mill and Cabinet Workers Union*, (Super. Ct. 1939), 4 Labor Relations Reporter 493 (distinguished on the ground that the picketing union represented about 50% of the employees); *Patterson v. Journeyman Barbers Union*, 5 Labor Relations Reporter 20 (Super. Ct. 1939); *Los Angeles Club v. Local Joint Board*, C. C. H. par. 18,063 (Super. Ct. 1937).

.... The law recognizes this de facto interest to the extent of an immunity from legal responsibility for financial loss to employers which results from strikes and picketing, when such strikes and picketing are conducted in a lawful manner;"<sup>65</sup> but the lack of a case directly in point precludes a definite conclusion.

The high tribunals of the states of Washington,<sup>66</sup> Kentucky,<sup>67</sup> and Texas,<sup>68</sup> and of the District of Columbia,<sup>69</sup> in deciding rival union

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<sup>65</sup> *Scofes v. Helmar*, 187 N. E. 662 (Sup. Ct. 1933). The New York cases of *Stillwell Theatre v. Kaplan*, 259 N. Y. 405, 182 N. E. 63 (1932), and *Exchange Bakery v. Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927) were quoted with approval, and picketing to unionize was held lawful. See also *Shaughnessy v. Jordan*, 184 Ind. 499, 111 N. E. 622 (1916); *Vonderschmitt v. McGuire*, 100 Ind. App. 632, 195 N. E. 585 (1935); *Local Union No. 26 National Brotherhood of Operative Potters v. City of Kokomo*, 211 Ind. 72, 5 N. E. (2d) 624 (1937). See, however, *Wiest v. Dircks*, 20 N. E. (2d) 969 (Ind. Sup. 1939) and *Roth v. Local Union 1460*, C. C. H. par. 18,509 (Ind. 1939) for what may be the beginning of a trend in the opposite direction.

<sup>66</sup> *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 63 Pac. (2d) 397 (1936). Here, the International Brotherhood of Teamsters was restrained from calling any strike or declaring any boycott or performing any other act aimed to coerce members of the United Brewery Workers Union into becoming members of its organization, or aimed to prevent the brewery workers from being represented by the persons they themselves selected. See also *Adams v. Building Service Employees Union*, 84 Pac. (2d) 1021 (Wash. 1938).

<sup>67</sup> *Hotel and Restaurant Union v. Miller*, 114 S. W. (2d) 501, 272 Ky. 466 (1938) ("The employer and a legitimate labor union had come to terms. There was a binding contract . . . . Here the employer was not 'unfair to organized labor'. He had the right to be let alone. He was entitled to the law's protection from a third party's interference.").

<sup>68</sup> *International Association of Machinists v. Federated Association of Accessory Workers*, 109 S. W. (2d) 301 (Tex. 1937). (In this case the Federated Association of Accessory Workers, an organization formed after the International Association of Machinists had called a strike, claiming to represent some 27 out of 36 employees, secured an injunction restraining the I. A. M. from "picketing or causing to be picketed the premises or business establishment of Beard & Stone Electric Company . . . and from in any manner interfering with the plaintiffs or any of them in pursuit of their employment . . . ." No actual violence was alleged, the decision turning chiefly on the ground of illegal purpose); *Lyle v. Amalgamated Meat Cutters*, 124 S. W. (2d) 701 (Tex. 1939) (picketing to unionize plaintiff's sole employee held a deprivation of liberty and property rights). See, however, *Haden Employees Association v. Lovett*, 122 S. W. (2d) 230 (Tex. 1938), where picketing to induce breach of contract between plaintiff union and its employer was permitted in the absence of findings of violence and infliction of damage or injury.

<sup>69</sup> *Metal Door and Trim v. International Association, Local 5*, 12 *Law and Labor* 183 (D. of C. Sup. 1930).

disputes, have been disposed to regulate the attacking union's activities rather than to permit resolution of the economic issues involved by the coercive power which the disputants themselves might exert. The remaining state supreme courts have not ruled directly on rival unionism, but some inkling of their probable attitudes may be garnered from the recent cases here appended.<sup>69a</sup>

The few direct rulings on rival unionism rendered by the Federal courts prior to the passage of the Norris Act indicated little sympathy with the *Stillwell* rationale. In a case involving a jurisdictional dispute between two construction unions,<sup>70</sup> a district judge held:

The simple fact is that we do not have here a controversy between employers and employees. In no legal sense is this a labor dispute . . . . There is no dispute here between any of the labor union defendants and the plaintiff concerning terms or conditions of employment . . . . In no event does that right [of the defendant union to secure work] include the right to induce or persuade another to breach an existing contract.<sup>71</sup>

This brief summary has indicated that most courts have been prone to repress the outward and explosive manifestations of rival union disputes, leaving basic issues untouched, rather than to permit final solution by the parties themselves without judicial intervention, or to strive for complete judicial resolution through the issuance of comprehensive restraining orders requiring some positive action by all parties, including the employer. Appraisal of the wis-

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<sup>69a</sup> *Arkansas*: *Riggs v. Tucker Duck & Rubber Co.*, 119 S. W. (2d) 507 (1938). *Colorado*: *People v. Harris*, C. C. H. par. 18,368 (1939); *Buckingham Transportation Co. v. Brotherhood of Teamsters*, C. C. H. par. 18,425 (Dist. Ct. 1939). *Florida*: *Weissman v. Jureit*, 181 So. 898 (1938); *Retail Clerks Union v. Lerner Shops*, C. C. H. par. 18,493 (1939). *Maine*: *Keith Theatres v. Vachon*, 187 Atl. 692 (1936). *North Dakota*: *State v. Russel*, 264 N. W. 532 (1936). *Oregon*: *Crouch v. Central Labor Council*, 134 Ore. 612, 293 Pac. 729 (1930); *Blumauer v. Portland M. P. M. O. Union*, 140 Ore. 35, 12 Pac. (2d) 333 (1932); *Starr v. Laundry & Dry Cleaning Workers*, 155 Ore. 634, 63 Pac. (2d) 1104 (1936); *Wallace v. I. A. M.*, 155 Ore. 652, 63 Pac. (2d) 1090 (1936). *Rhode Island*: *Bomes v. Providence Local Union*, 51 R. I. 499, 155 Atl. 581 (1931).

<sup>70</sup> The Amalgamated Sheet Workers International Alliance and the United Brotherhood of Carpenters and Joiners.

<sup>71</sup> *Central Metal Products Corp. v. O'Brien*, 278 Fed. 827 (1922), *affd.* 5 Fed. (2d) 389 (1922). For a similar decision, see *Dahlstrom Metallic Door Co. v. Local 603*, 8 *Law and Labor* 123 (1926).

dom of any of these alternative approaches involves the arduous task of determining the net social effect of each decision individually, a task which cannot be attempted here.<sup>72</sup>

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<sup>72</sup> An attempt of this character has been made by Duane McCracken, *Strike Injunctions in the New South*, (Un. of North Carolina Press 1931). See also: E. E. Witte, "Value of Injunctions in Labor Disputes," 32 *Journal of Political Economy* 335 (1924); E. E. Witte, "Results of Injunctions in Labor Disputes," 12 *American Labor Legislation Review* 197 (1922); E. E. Witte, "Social Consequences of Injunctions," 24 *Illinois Law Review* 772 (1930).

## THE IMPACT OF RECENT LEGISLATION

The Norris-La Guardia Act<sup>1</sup> and Section 7(a) of the National Industrial Recovery Act<sup>2</sup> grew out of years of effort on the part of organized labor to improve the position of the wage-earner in the legislative and judicial fields. These enactments, together with subsequent "New Deal" legislation, must be regarded as complementary, forming a comprehensive but not well integrated labor code. For convenience in exposition, however, each will be treated separately, leaving evidences of functional relationship to the later section on judicial interpretation. The history of antecedent legislation has been related elsewhere,<sup>3</sup> and a recapitulation will not be attempted here. It will be remembered that the orientation is specifically directed toward the problems of rival unionism.

### A. FEDERAL AND STATE ANTI-INJUNCTION ACTS

1. Federal—Despite early optimism, Sections 6 and 20 of the Clayton Act<sup>4</sup> and their state counterparts proved of very little effect in curbing the issuance of labor injunctions.<sup>5</sup> Widespread agitation, supported by vivid descriptions of the pernicious social effects of injunctions,<sup>6</sup> resulted in the passage of the Norris-La Guardia

<sup>1</sup> 47 Stat. 70 (1932).

<sup>2</sup> 48 Stat. 195 (1933).

<sup>3</sup> See, for instance, Commons and Andrews, *Principles of Labor Legislation* (New York, 1936); Berman, Edward, *Labor and the Sherman Act* (New York, 1930); Lorwin and Wubnig, *Labor Relations Boards* (Washington, 1935); Wolf, Harry D. *The Railroad Labor Board* (Chicago, 1927); Frankfurter and Greene, *The Labor Injunction* (New York, 1930), chap. iv; Bernheim and Van Doren, *Labor and the Government* (New York, 1935); Paul F. Brissenden, "Genesis and Import of the Collective Bargaining Provisions of the Recovery Act," in *Economic Essays in Honor of Wesley C. Mitchell* (New York, 1935).

<sup>4</sup> 63rd Congress, 2nd Session, *Laws of 1914*, c. 323.

<sup>5</sup> Senator Blaine remarked, ". . . the labor sections of the Clayton Act—aside from the section relating to jury trial—have become meaningless and have completely failed of their purpose." *Congressional Record*, Vol. 75, Part 4, p. 4619.

<sup>6</sup> U. S. Senate, Hearings before the Committee on the Judiciary, 70th Congress, 1st Session (1928), on S. 1482.

Act, "To amend the judicial code and to define and limit the jurisdiction of courts sitting in equity,"<sup>7</sup> the far reaching effects of which are but slowly making themselves felt.

Under the provisions of the Act, the authority of the courts of the United States to issue temporary or permanent injunctions in "labor disputes" is severely restricted by the imposition of certain prerequisites to such issuance.<sup>8</sup> But before the privileges and immunities of the limiting clauses may be deemed applicable to a given situation, it must be shown that a "labor dispute" is involved. Consequently, the pivotal point about which the entire act revolves<sup>9</sup> is the controversial Section 13, wherein "labor dispute" is given precise definition.<sup>10</sup> Of chief interest here is Section 13(a) which provides:

A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is . . . (3) *between one or more employees or associations of employees and one or more employees or associations of employees.* [Italics mine.]

<sup>7</sup> *Supra*, n. 1. The act, as its title implies, is intended primarily to limit equity jurisdiction rather than to revise the substantive law, because "Legislative revision of substantive law has, on the whole, proved futile." Frankfurter and Greene, *op. cit.* at n. 3, p. 150.

<sup>8</sup> *Supra*, n. 1, Sections 7, 8 and 9.

<sup>9</sup> ". . . it is the section of the Norris-La Guardia Act which defines a labor dispute that marks the real advance over the substantive law existing under the Clayton Act." Note, 50 *Harvard Law Review* 1296 (1937).

<sup>10</sup> The Clayton Act limited injunction "in any case between an employer and employees, or between employers and employees, or between employees, or between employers, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment . . .," seemingly a broad area. A number of adverse court decisions, including the famous one by the United States Supreme Court through Justice Pitney in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443 (1921), and the restrictive dicta of Judge Parker in *United Mine Workers v. Red Jacket Consolidated Coal and Coke Co.*, 18 Fed. (2d) 839 (1927), rendered this section innocuous as a means of preventing the issuance of injunctions. The Norris Act, by labeling a controversy a labor dispute "regardless of whether or not the disputants stand in the proximate relation of employer and employee," attempts to forestall the objections raised by Justice Pitney in the *Duplex* case. "These definitions include . . . a definition of a person participating in a labor dispute which is broad enough to include others than the immediate disputants and thereby corrects the law as announced in the case of *Duplex Printing Press v. Deering*." U. S. House of Representatives, Committee on the Judiciary, 72nd Congress, 1st Session (1932), Rep. No. 821.

Section 13(b)<sup>11</sup> is likewise important with respect to the problem of rival unionism.<sup>12</sup>

Upon the finding of a labor dispute, the remaining sections of the Act are applicable. The inhibitions contained in Section 4 limit the power of federal courts to prescribe the conditions under which picketing not involving fraud or violence may be permitted and, in general, reduce judicial supervision of labor disputes. Frankfurter and Greene, who have been credited with the authorship of the Act,<sup>13</sup> maintain that the clauses of Section 4 ". . . modify the law as most federal courts now understand it."<sup>14</sup>

2. State—A number of states emulated the federal government in the limitation of equity jurisdiction in labor controversies. Indiana,<sup>15</sup> Minnesota,<sup>16</sup> Oregon,<sup>17</sup> North Dakota<sup>18</sup> and Washington<sup>19</sup> adopted statutes identical with the Norris Act with regard to the crucial "labor dispute" definitions. Colorado<sup>20</sup> and Idaho<sup>21</sup> inserted after the clause "or seeking to arrange terms or conditions of employment" (Section 13(c) of the Norris Act) the further proviso "or concerning employment relations, or any other controversy aris-

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<sup>11</sup> "A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

<sup>12</sup> Mr. Emery, representing the National Association of Manufacturers, conceded that "of course, a controversy between two labor organizations is a labor controversy under the provisions of this act," in referring to S. 1482, a measure practically similar to the present act. U. S. Senate, Hearings before the Committee on the Judiciary, 70th Congress, 1st Session (1928), on S. 1482, p. 860.

<sup>13</sup> See dissent of Judge Otis in *Donnelly Garment Co. v. I. L. G. W. U.*, 21 Fed. Supp. 807 (1938); Malcolm Sharp and Charles O. Gregory, *Social Change and Labor Law* (Chicago, 1939), p. 138.

<sup>14</sup> Frankfurter and Greene, *op. cit.* at n. 3, p. 219.

<sup>15</sup> *Burns Indiana Statutes Anno.*, Title 40, c. 5, Secs. 501-514.

<sup>16</sup> *Mason's Minnesota Statutes*, 1934 Supp., c. 23, Sec. 4255. However, see *infra*, p. 139, for the effect of subsequent legislation.

<sup>17</sup> *Oregon Code Anno.*, 1935 Supp., c. xix, Sec. 49 (1901-1914). This Act was practically repealed by subsequent legislation. *Infra*, p. 135.

<sup>18</sup> *Laws of 1935*, c. 247.

<sup>19</sup> *Laws, Extraordinary Session 1933*, c. 7.

<sup>20</sup> *Colorado Stat. Anno.* c. 97, Secs. 76-87.

<sup>21</sup> *Laws of 1933*, c. 215. Connecticut, *Laws of 1939*, c. 309a, has recently adopted similar legislation.

ing out of the respective interests of employer and employee."<sup>22</sup> Maryland,<sup>23</sup> New York,<sup>24</sup> Utah,<sup>25</sup> Wisconsin<sup>26</sup> and Louisiana<sup>27</sup> incorporated this same amendment but omitted from the sections paralleling Section 13 (a) of the Norris Act the phrase "or have direct or indirect interests therein."<sup>28</sup> Massachusetts<sup>29</sup> also excluded the above quoted phrase, and in addition discarded the locution "regardless of whether or not the disputants stand in the proximate relation of employer and employee."<sup>30</sup> A very abbreviated version of the Norris Act was passed by the New Mexican legislature.<sup>31</sup>

The New York Act, by specific provision, reserved to both employer and employee the privilege of enjoining breaches of collective agreements,<sup>32</sup> and is more comprehensive than the Norris Act in defining non-enjoinable acts.<sup>33</sup> Wisconsin was unique in altering the

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<sup>22</sup> The original draft of the Norris Act contained this clause, but it was deleted on the floor of the House. The effect of this addition is to broaden the definition to include matters not directly involving terms or conditions of employment.

<sup>23</sup> *Laws of 1935*, c. 574.

<sup>24</sup> *Civil Practice Act*, Section 876(a).

<sup>25</sup> *Laws of 1933*, c. 15.

<sup>26</sup> *Statutes 1933*, c. 376, Secs. 268.18—268.30. This act was emasculated by subsequent legislation. *Infra*, p. 135.

<sup>27</sup> 73rd Congress, 2nd Session, U. S. Senate, S. 2926 (1934).

<sup>28</sup> This excision serves to narrow the scope of the definition of a case growing out of a labor dispute. See H. N. Monkmeyer, "Five Years of the Norris-La Guardia Act," 2 *Missouri Law Review* 1 (1937).

<sup>29</sup> *Massachusetts Acts 1935*, c. 407.

<sup>30</sup> This constitutes a significant omission, inasmuch as this particular phrase largely answered the arguments of Justice Pitney in the Duplex case. See *Simon v. Schwachman*, 18 N. E. (2d) 1, (Sup. Jud. Ct. Mass. 1938); *Quinton's Markets Inc. v. Patterson*, C. C. H. par. 18,455 (Sup. Jud. Ct. Mass. 1939).

<sup>31</sup> *Laws of New Mexico, 1939*, c. 195, Sections 1, 2.

<sup>32</sup> *Civil Practice Act*, Section 867(a), 1(a), which makes one of the requisite findings precedent to the granting of an injunction "That unlawful acts have or a breach of any contract not contrary to public policy has been threatened or committed and that such acts or breach will be executed or continued unless restrained." See Osmond K. Frankel, "Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts," 30 *Illinois Law Review* 854 (1936).

<sup>33</sup> No item of relief granted may forbid "Giving publicity to *and obtaining or communicating information regarding* the existence of, or the facts involved in, any dispute, whether by advertising, speaking, *picketing*, patrolling *any public street or any place where any person or persons may lawfully be*, or by any other method not involving fraud, violence *or breach of the peace*." [Italicized material not found in the Norris Act.] Section 103.53(1)(c) of the original Wisconsin Act was substantially similar in effect.

substantive law, as well as the equity power of the courts, by making peaceful picketing, patrolling, and other specified acts, legal absolutely.<sup>34</sup>

Pennsylvania, in enacting an anti-injunction law<sup>35</sup> some five years subsequent to the adoption of the Norris Act, incorporated a series of important innovations designed to clarify the legislative intent in the face of restrictive judicial interpretation. Section 3(c), in defining a labor dispute, enlarged Section 13(c) of the federal act by including "employment relations or any other controversy arising out of the respective interests of employer and employe, regardless of whether or not the disputants stand in the proximate relation of employer and employe, and regardless of whether or not the employes are on strike with the employer." In Section 3(h), "The term 'employe' is declared to include all natural persons who perform services for other persons, and shall not be limited to the employes of a particular employer, and shall include any individual who has ceased work as a consequence of, or in connection with, any matter involved in a labor dispute."<sup>36</sup> Section 3(j) offered a possible source of restriction by providing that a "labor organization" as defined in the Act should have among its purposes "that of collective bargaining as to terms and conditions of employment."

Another important difference was the prohibition in Section 6 of enjoining employees from "organizing themselves, forming, joining or assisting in labor organizations, bargaining collectively with an employer by representatives freely chosen and controlled by themselves, or for the purpose of collective bargaining or other mutual aid or protection, or engaging in any concerted activities." A further aberration was contained in Section 7, whereby temporary restraining orders might not issue where striking employees had been replaced either by outside persons or by fellow employees, seemingly offering an effective bar to rival union strikebreaking. Finally, Section 7(h) deprived the courts of the rationale of "illegal means" as a basis for the grant of injunctive relief.

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<sup>34</sup> *Supra*, n. 26, Section 103.53(1) and (2).

<sup>35</sup> Pennsylvania, Act No. 308, *Laws of 1937*. But see *infra*, p. 136, for significant modifications in 1939.

<sup>36</sup> In this and other definitions, the influence of the intervening labor relations acts is clearly evident.

## B. SECTION 7(A), NATIONAL INDUSTRIAL RECOVERY ACT

The famous Section 7(a)<sup>37</sup> served as the basis for the solution of several interesting rival union disputes. The extent to which the pre-existing common law was modified by its passage has been debated at length.<sup>38</sup> Interest centered about the clause making it unlawful for an employer to require any one "to refrain from joining, organizing or assisting a labor organization of his own choosing." This was interpreted by the administrator as restricting the widely recognized right of employer and employees to enter into closed shop agreements.<sup>39</sup> It was further argued that if an employer agreed to employ only the members of a particular union, he was in effect discouraging membership in unions rival to the contracting organization.<sup>40</sup>

On the question of representation, an executive order was issued providing that "the [National Labor] Board shall publish promptly the names of those representatives who are selected by the vote of at least a majority of the employees voting, and have been thereby designated to represent all the employees eligible to participate in such an election for the purpose of collective bargaining . . . ."<sup>41</sup>

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<sup>37</sup> 48 U. S. Stat. 195 (1933). "(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing . . . ."

<sup>38</sup> Brissenden, Paul F. "Genesis and Import of the Collective Bargaining Provisions of the Recovery Act," *op. cit.* at n. 3; "Effect of Section 7(a) on the Validity of a Closed Union Shop Contract," 44 *Yale Law Journal* 1067 (1935); "Section 7(a) of the N. I. R. A.," 34 *Columbia Law Review* 1529 (1934); "Effect of Section 7(a) of the N. I. R. A. Upon the Rights of Employer and Employees," 11 *N. Y. U. Law Quarterly* 237 (1933); "Status of the Strike for Closed Shop," 3 *Law Journal Stu. B. A. Ohio* 359; "Impact of the Courts Upon the N. R. A. Program," 44 *Yale Law Journal* 90 (1934); "Some Legal Aspects of the N. R. A.," 47 *Harvard Law Review* 85 (1933); Lorwin and Wubnig, *op. cit.* at n. 3, p. 447; Bernheim and Van Doren, *op. cit.* at n. 3, pp. 241ff; M. Sargent, "Majority Rule in Collective Bargaining Under Section 7(a)," 29 *Illinois Law Review* 275 (1934).

<sup>39</sup> N. R. A. Release No. 5629, June 18, 1934, Speech by General Johnson.

<sup>40</sup> *New York Times*, Sept. 2, 1933, p. 1; Sept. 26, 1933, p. 7.

<sup>41</sup> N. R. A. Release No. 3078, Feb. 1, 1934.

The effect of this interpretation, however, was vitiated by the Johnson-Richberg pronunciamiento<sup>42</sup> which, predicated upon the unrestricted right set forth in Section 7(a) 1, proclaimed that

This selection of majority representatives does not restrict or qualify in any way the right of minority groups of employees or of individual employees to deal with their employer . . . . Section 7(a) affirms the right of employees to organize and bargain collectively through representatives of their own choosing; and such concerted activities can be lawfully carried on by either majority or minority groups.

The net result was a situation deductively insoluble.<sup>43</sup> However, practical application of majority rule by the National Labor Board,<sup>44</sup> and the absence of adverse judicial opinion, prevented Section 7(a) from being used to uproot the common law privilege of concluding closed shop agreements, and circumscribed its employment by weak unions as a weapon with which to combat stronger rivals.

### C. THE LABOR RELATIONS ACTS

Upon the invalidation of the N. R. A., Congress<sup>45</sup> and five state legislatures<sup>46</sup> embarked<sup>47</sup> upon a new labor policy, the essence of which was definite governmental encouragement to collective bargaining by the creation of formal machinery to forestall deterrents to the orderly procedures involved in negotiation. To outline even in brief the chief departures from traditional concepts entailed by the judicial digestion of these enactments would entail a task far more ambitious in scope than the present work. However, those

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<sup>42</sup> N. R. A. Release No. 3126. This position was supported by Minier Sargent, "Majority Rule in Collective Bargaining Under Section 7(a)," 29 *Illinois Law Review* 275 (1934).

<sup>43</sup> The Senate Committee on Education and Labor, in its report on the Wagner Act (74th Congress, 1st Session, Calendar No. 595, Report No. 573 on S. 1958) stated: "According to some interpretations, the provision of Section 7(a) of the N. I. R. A., assuring the freedom of employees . . . was deemed to illegalize the closed shop. The committee feels that this was not the intent of Congress when it wrote Section 7(a)."

<sup>44</sup> *Infra*, p. 233.

<sup>45</sup> 49 Stat. 449, 29 U. S. C. 151-66 (Supp. II 1936).

<sup>46</sup> Massachusetts (c. 436, Laws 1937); New York (c. 443, Laws 1937); Pennsylvania (No. 294, Laws 1937); Utah (c. 55, Laws 1937); Wisconsin (c. 51, Laws 1937). The Wisconsin Act was repealed, the Pennsylvania Act drastically amended in 1939.

<sup>47</sup> This should not be taken to mean that this was the first governmental attempt to foster collective bargaining. Federal war and railroad labor legislation and sporadic state measures, such as the Kansas Industrial Court, were forerunners of the labor relations acts, but did not purport to cover as broad a field as the later acts mapped out.

provisions of the acts touching upon issues affecting rival unionism will be examined as a preliminary to exposition of the acts in operation. And since there appears to be little relevant material in the acts themselves, exploration into legislative history becomes inevitable.

1. **The National Labor Relations Act**—In 1934, Senator Wagner introduced in the Senate a bill "To create a National Labor Board,"<sup>48</sup> differing in several important respects from the present legislation. Briefly, the chief points of divergence were: (1) inclusion of a provision limiting closed shop agreements to a duration of one year and explicitly permitting an employer to favor one or more groups of his employees;<sup>49</sup> (2) creation of a tripartite, partisan board to administer the Act; (3) the grant of power to act as an arbitration tribunal to the board so constructed.

Testimony offered at the public hearings on the bill indicates that the dilemmas of rival unionism did not escape unnoticed. Mr. Hal H. Smith, representing the National Automobile Chamber of Commerce, proposed amendment on the ground that "the right of collective bargaining upon the part of the employe is interfered with and will be interfered with, not always by the employer, but very often by rival labor organizations . . . . Our position is that the law, if it is to be valid either in the courts, or at the bar of public opinion must lay the penalties upon every one who interferes with the right

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<sup>48</sup> 73rd Congress, 2nd Session, U. S. Senate, S. 2926 (1934).

<sup>49</sup> Section 5(6) made it an unfair labor practice "To engage in any discriminatory practice as to wage or hour differentials, advancement, demotion, hire, tenure of employment, reinstatement, or any other condition of employment, which encourages membership or nonmembership in any labor organization: *Provided*, That where a contract or agreement of any kind is or shall be in force between an employer and a group of employees, the provisions of such contract or agreement regarding conditions of employment shall not, because of anything contained in this paragraph, compel an employer to observe similar conditions of employment in his relations with all his employees: *Provided further*, That nothing in this Act shall preclude an employer and a labor organization from agreeing that a person seeking employment shall be required as a condition of employment, to join such labor organization, if no attempt is made to influence such labor organization by any unfair labor practice, if such labor organization is composed of at least a majority of such employer's employees, and if the said agreement does not cover a period in excess of one year."

of collective bargaining."<sup>50</sup> On the other hand, Mr. Isidore Polier, on behalf of the International Juridical Association, placed in testimony a brief which proposed amendment (1) to prohibit closed shop agreements where minorities are represented by rival labor organizations; (2) to prevent unequal treatment of workers in respect to wages, hours and conditions of employment; (3) to provide for autonomous representation by any group of ten per cent of the employees of an establishment.<sup>51</sup> Dr. Paul F. Brissenden called attention to the probable effect of the proposed legislation upon situations paralleling that existing in a contemporary rival union case.<sup>52</sup> Majority rule was opposed by left-wing leaders, representing minority unions.<sup>53</sup> The bill failed of passage.

In 1935, Senator Wagner introduced into the Senate another bill,<sup>54</sup> eventually enacted *sub nomine* "National Labor Relations Act."<sup>55</sup> The public hearings again indicated some awareness of the implications of the proposed Act for rival unionism. Representatives of employer organizations took up the cudgels for minority unions. Walter Gordon Merritt, long associated with employer groups, testified: "I think there should be something written in the law which permits of representation by substantial minorities . . . .But what I object to is that substantial minorities here are barred from the very negotiations of bargaining."<sup>56</sup> He was controverted by other wit-

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<sup>50</sup> U. S. Senate, Hearings before the Committee on Education and Labor, 73rd Congress, 2nd Session, March, 1934, on S. 2926, p. 709.

<sup>51</sup> *Ibid.*, p. 1012.

<sup>52</sup> "If I do not misinterpret this bill it would require . . . in the situation existing in the Fair Lawn case, that the employer scrap his agreement with the American Federation of Labor affiliate, the International Fur Workers Union, and negotiate and enter into an agreement . . . with the Needle Trade Workers Industrial Union. He would be required to abandon the first agreement, not because it is a closed shop contract, and certainly not because it is an American Federation of Labor affiliate, but because it is an agreement deviously entered into with an organization including at best only a minority and at worst none of his employes, with the purpose of evading the necessity of dealing with the self-designated representatives of a majority of his employes." *Ibid.*, p. 216. The case to which reference was made is *Fryns v. Fair Lawn Fur Dressing Co.*, 114 N. J. Eq. 462, 168 Atl. 862 (1933).

<sup>53</sup> Testimony of Joe Kiss, representing the Furniture Workers Industrial Union, *ibid.*, p. 430.

<sup>54</sup> 74th Congress, 1st Session, S. 1958 (1935).

<sup>55</sup> 49 Stat. 449, 29 U. S. C. 151-66 (1935).

<sup>56</sup> U. S. Senate, Hearings before the Committee on Education and Labor, 74th Congress, 1st Session, 1935, p. 319.

nesses, who argued the impracticability of minority representation. Edwin S. Smith, subsequently a member of the National Labor Relations Board, was quite definite:

No one would deny that a minority of workers, or an individual worker, has certain natural rights, or at least natural relationships to his employer, but in the process of collective bargaining on wages and hours and basic working conditions the rights of the minority must be very definitely circumscribed. When an organized minority and an organized majority coexist in the same plant, one may not, reasonably, bargain with the minority for the whole. One may reasonably do so with the majority.<sup>57</sup>

Dr. Harry A. Millis, of Chicago University, pointed out the difficulties inherent in any proportional representation plan,<sup>58</sup> and Chairman Walsh agreed, "Of course, I can understand if the minority and majority were sent in together, they would be constantly quarreling, and would not get anywhere."<sup>59</sup>

The Special Committee on the Government and Labor of the Twentieth Century Fund, Inc., recommended granting jurisdiction to the Board "over all disputes that arise between or among employees on questions of employee organization and representation, with power to decide what is the appropriate union . . . ."<sup>60</sup> Harold Roland Shapiro, of New York, stated: "Jurisdictional disputes should be placed under the compulsory jurisdiction of impartial tribunals, appointed by the President."<sup>61</sup>

Nor were the possible effects of the proposed Act upon the right to strike under conditions of rival unionism overlooked. Chairman Walsh commented: "As I read this bill, if an agreement of collective bargaining is entered into, by the representatives of a majority group with the employer, and a minority group chooses to strike,

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<sup>57</sup> *Ibid.*, p. 162.

<sup>58</sup> *Ibid.*, p. 181. Proportional representation "tends to keep the organizational situation open and plastic, while majority rule tends to maintain and to increase the strength of the representation plan or union which has succeeded in obtaining a recognized majority. But, on the other hand, and because it does keep the organizational situation open and plastic, it inevitably tends to place a premium on continued division of the workers and to make for jealousy, friction and struggle . . . . So long as there are two or more rival organizations functioning through a composite committee or council, differences will be exhibited in conference . . . . Moreover, under such an arrangement the workers will certainly not cooperate in making a show of strength by withdrawing their labor power."

<sup>59</sup> *Ibid.*, p. 319.

<sup>60</sup> *Ibid.*, p. 719.

<sup>61</sup> *Ibid.*, p. 702.

they can do so."<sup>62</sup> Jason B. Evans, of the International Union of Operating Engineers, proposed "That no strike shall be permitted by any labor organization, or the members thereof, for the purpose of forcing the discharge or preventing the employment of men belonging to any other labor union."<sup>63</sup>

Robert T. Caldwell, attorney for the American Rolling Mill Co., proposed the amendment of Section 9 to specify a definite time during which certification should remain valid, "because otherwise the losing group who have been there will come back maybe next week or next month and want the board to have another election because they think they can win it . . . ."<sup>64</sup> William Leiserson, Chairman of the National Mediation Board, urged the complete exclusion of the employer from any participation in inter-union disputes concerning representation.<sup>65</sup>

The Committee on Labor of the House of Representatives held concurrent hearings on a measure similar in all respects save for the addition of arbitration provisions. William Green, president of the American Federation of Labor, strongly opposed plural representation: "Collective bargaining can obviously succeed only when majority rule is made effective . . . . Employers who are bitterly opposed to collective bargaining realize this and have evolved the doctrine of minority representation to prevent and destroy genuine collective bargaining . . . it cannot be that two agencies are permitted to negotiate with management for general conditions of employment."<sup>66</sup> Representative Ramspeck suggested that the bill provide for the adjudication of jurisdictional disputes.<sup>67</sup>

The course of the bill through Congress was marked by attempts at amendment, most significant of which was the proposed addition to Section 7 of the phrase "free from coercion or intimidation from any source." In the course of highly illuminating debate in the Senate upon this amendment, the sponsors of the Wagner Act

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<sup>62</sup> *Ibid.*, p. 289.

<sup>63</sup> *Ibid.*, p. 767.

<sup>64</sup> *Ibid.*, p. 446.

<sup>65</sup> *Ibid.*, p. 876.

<sup>66</sup> House of Representatives, Hearings before the Committee on Labor, 74th Congress, 1st Session, on H. R. 6288 (1935), p. 197.

<sup>67</sup> *Ibid.*, p. 232.

clearly disclosed their belief that its provisions did not extend to relations between employees:

Senator Wagner: There is a difference between using the word "coercion" as between employees and using it as between an employer and an employee. . . . So far as coercion is concerned, if it exists among employees, there is now an absolute legal right to go into court and seek an injunction if such coercion takes the form of intimidation or violence of any kind or character. When I was a judge I issued such injunctions myself. But how has the word "coercion" as among employees been interpreted by the courts? The use of pickets, mere persuasion without any force, threats or intimidation, has been deemed coercion; and employees simply trying to persuade their fellow workers to join a particular organization have been charged with coercion . . . .

Senator Couzens: Mr. President, of course the Senator from Maryland knows, as does the Senator from New York—and that is the reason why I am astonished by the objection of the Senator from New York to this amendment—that in every big industrial community there is competition between one union and another. There is just as much fight, there is just as much effort, there is just as much salesmanship, there is just as much force used in many cases to induce workmen to join one union as to join another. For the life of me I do not understand why a union should be enabled to coerce a worker into an organization which he does not choose to join . . . .

Senator Wagner: Such acts are today illegal and remediable if they amount to threats or intimidation or force of any kind or character . . . .

Senator Couzens: What the Senator from Michigan is trying to do is to support the contention of the Senator from Maryland that coercion between union and union should be prohibited . . . .<sup>68</sup>

In the discussion of another amendment, reading: "It shall be an unfair labor practice for any person to coerce employees in the exercise of their rights guaranteed in Section 7, or to coerce employees in their right to work or to join or not to join any labor organization," similar Congressional intent was manifested:

Senator Tydings [the sponsor]: I wish to ask the Senator from New York a question. He implies in his argument that it is wrong for the employer to coerce the employee, and with that I am in accord; but he implies in his argument that it is not wrong for a labor organization to coerce an employee who does not want to belong to the organization to which the coercers belong . . . . Does he not say in effect that . . . it is not wrong for an employee to coerce another employee? . . .

Senator Borah: They [non-members of coercing organization] would not be covered either by the amendment or by the provisions of the bill. *If we*

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<sup>68</sup> *Congressional Record*, Vol. 79, Part 7 (1935), p. 7654.

*are to enter the field of legislation as between employees the bill would have to be radically changed . . . .*<sup>69</sup> [Italics mine]

Senator Walsh: Mr. President, without the Senator's amendment the bill forbids that [employer coercion]. That is the very purpose of the bill. It is not to regulate the relation of employee to employees, it is to regulate the relation of employees to employers . . . . The employer is the only person who can effectively coerce an employee . . . . We have not gone in this bill into the field of relationship between employee and employee . . . . We are not going to encourage or discourage employees with reference to organizing unions . . . economic coercion is a weapon that could be exercised by the man who hires and discharges, and not by a fellow employee. Only an employer has it within his power to use economic pressure . . . if Congress were to make it an unfair labor practice for an employer to coerce his fellow employees to join or to refrain from joining an organization, some court, relying on earlier decisions, and not adequately informed of the purpose of this bill, might conclude that strikes and pickets had been made unlawful."<sup>70</sup>

Against these declarations made on the floor of the Senate must be set down the necessary implications of Section 9(c) of the Act giving the Board power to decide questions "concerning the representation of employees." Properly to fulfill its functions, the Board must constantly enter the field of employee relationships. The House Committee on Labor recognized this fact:

The question [of representation] will ordinarily arise as between two or more bona fide organizations competing to represent the employees, but the authority granted here is broad enough to take in the not infrequent case where only one such organized group is pressing for recognition . . . . When there are contending factions of doubtful or unknown strength, or the representation claims of the only organized group in the bargaining unit are challenged, there exists that potentiality of strife which the bill is designed to eliminate by the establishment of this machinery for prompt, governmentally supervised elections.<sup>71</sup>

The net result would appear to be that the National Labor Relations Board was empowered to intervene in rival union disputes only when a question concerning representation arose, and then for the sole purpose of determining the proper representative for collective bargaining. In all other conflicts that might arise between unions, the Board lacks jurisdiction to intervene. The penumbra of

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<sup>69</sup> Earlier in the debate, Senator Borah made remarks of a similar tenor: "We are dealing here with the relation between employer and employee. If we take up the matter of legislating between employees as perhaps we should, then we shall have to make far more machinery than the amendments provide. That is the only objection I see to placing it in this bill. It introduces a wholly new field of legislation." *Ibid.*, p. 7650.

<sup>70</sup> *Ibid.*, pp. 7655 ff.

<sup>71</sup> U. S. Congress, 74th Congress, 1st Session, House of Representatives, Report No. 1147 (1935).

the express authorization, however, is subject to enlargement by interpretation.<sup>72</sup> The actual limits defined by the Board will be discussed below.

The Act finally adopted deals with rival unionism only by implication. Section 9(a), specifically incorporating the doctrine of majority rule, presumably denies to minority groups the privilege of bargaining collectively "in respect to rates of pay, wages, hours of employment, or other conditions of employment" when an organized majority is in existence. The overtones of this provision can be clarified only by reference to the adjudication of concrete disputes by the Labor Board. But it is at once obvious that the absence of a cohesive and strong majority group places difficult hurdles in the path of the smooth functioning of this section.<sup>73</sup> The employer's duty to bargain is "subject to the provisions of section 9(a)," yet there is no explicit statement defining the extent of this duty, given the failure of the conditions set forth in that section. Whether, in the absence of an organized majority, he must treat with minority groups, or whether in such event he is absolved from all obligation to bargain, cannot be determined with reference to the Act alone.<sup>74</sup> On the other hand, it is impossible to ascertain

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<sup>72</sup> Harry Shulman, Book Review, 51 *Harvard Law Review* 1121 (1938): "The Act was passed before the C. I. O.—A. F. L. schism, when the dominant purpose was to adjust the relations between employers and organizations of labor. Now the power to determine the appropriate bargaining unit becomes a power to decide between conflicting demands of labor organizations; and the act does not afford definite guidance."

<sup>73</sup> An able commentator has pointed out that the fundamental assumptions upon which the majority rule doctrine rests are often made untenable by the existence of more than one union within a single plant: "... the Act is framed in large part upon two assumptions: that there is a solidarity of interest among employees as against their employers; and that the chief impediment to the development of independent labor organizations is employer resistance. However true these assumptions may be, it is also true that factional fights and jurisdictional quarrels have contributed seriously to the failure of organizational campaigns in the past." Latham, "Legislative Purpose and Administrative Policy under the National Labor Relations Act," 4 *George Washington Law Review* 433 (1936). Similar comment may be found in Release Z-42, *Division of Economic Research*, National Labor Relations Board, March 12, 1937.

<sup>74</sup> "What does 8(5) mean? (1) Does it mean that it shall be an unfair labor practice for an employer to refuse to bargain with the representatives of his employees, but that, if there is a majority representative within the meaning of section 9(a), he may refuse to deal with all representatives other than that of the majority? Or (2) does it mean that it shall be an un-

from the content of the Act the degree of restraint imposed upon minority unions. Such groups are apparently safeguarded by 8(3), which makes it an unfair labor practice "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The proposition that this protection, by itself, both affords a sufficient palladium to rival organization activity and furthers the ulterior interests of the employees as a whole, is predicated upon the paternalistic assumption that the majority organization is inevitably best qualified to negotiate the terms and conditions of employment binding upon members and non-members alike<sup>75</sup> and that, moreover, minority groups will acquiesce in an agreement more favorable in terms than they could have secured through their own unaided efforts, rather than peremptorily reject the agreement solely because it was negotiated by the dominant rival.<sup>76</sup>

Nor is there an unclouded description of the status and privileges of minorities<sup>77</sup> both before and after the National Labor Relations

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fair labor practice for an employer to deal with the representatives of his employees other than with a majority representative selected under 9(a)? . . . . A third interpretation is possible here: that the only time that it is an unfair labor practice under 8(5) for an employer to bargain collectively [with a minority] is when there is a majority representative under 9(a). If this interpretation were adopted, reliance would have to be placed upon 8(1) . . . in order to enforce a duty to bargain collectively when there is no majority representative under 9, and 8(5) therefore does not apply." Note, "The National Labor Relations Act," 30 *Illinois Law Review* 884 (1936). See also Lennart Larson, "The Labor Relations Acts—Their Effect on Industrial Warfare," 36 *Michigan Law Review* 1237 (1938).

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<sup>75</sup> "It is difficult to see, as a practical matter, just what restriction of the freedom of the minority employee would result that would be harmful to him. On the other hand, this restriction would seem to be in his own interest. The minority will not be in a superior bargaining position to the majority and would not be able to exact better terms of employment than the majority, except in instances where the employer uses this means to favor the minority and thus to interfere with the rights of employees to be free from his influence in their choice of labor organization. The minority employee would seem to be in a worse position than ever unless both he and the employer are bound by the terms of the collective agreement promulgated by the majority." 30 *Illinois Law Review* 884, *op. cit.* at n. 74, footnote 204.

<sup>76</sup> In many instances, practical politics would dictate adamant refusal to cooperate in any way with a rival union, in the interest of eventual bargaining power and maintenance of organization.

<sup>77</sup> "Employees" are guaranteed the right of self organization. If the term "employee" is used generically, members of minorities would not necessarily be covered by this grant; if it is used atomistically, minority adherents

Board, under 9(c), certifies one union as the exclusive representative of all the employees. The Board has the power to prevent any person from engaging in any unfair labor practice affecting commerce, and may therefore order the employer to refrain from bargaining with an agency other than the one properly chosen in accordance with 9(a) and 9(c). But it is not vested with the correlative authority to estop the minority union from making demands upon the employer, notwithstanding the fact that the latter could not legally accede to the demands.<sup>78</sup>

Inclusion of a specific provision<sup>79</sup> to the effect that a closed shop agreement with a union representing the employees as provided in Section 9(a) does not constitute discrimination designed to influence choice of representation lends color to the view that the Act tends to eliminate minority bargaining. But again, no remedy is provided in the event of a strike carried on by an aggrieved minority against a valid agreement of this type.

This very brief outline, serving merely to point out a few of the pertinent ambiguities contained in the National Labor Relations Act, is hardly intelligible without detailed reference to authoritative interpretation by the competent tribunals. Yet it is of the utmost importance that the history of the Act be remembered when considering these interpretations, lest apparently logical reasoning applied to

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would retain the right in full. Even in the latter event, however, the right would be a hollow one if no corresponding duty to bargain were imputed to the employer, as it could not be if he exercised the option, permitted by Section 8(3), of contracting away his right to deal with any other than the majority union.

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<sup>78</sup> For cases in point, see *infra*, pp. 197-199. Professor Magruder, in "The Development of Collective Bargaining," 50 *Harvard Law Review* 1071 (1937) thinks, however, that a strike under the circumstances might be held illegal as a matter of common law: "if the strike is to compel the employer to bargain with an organization which, under the decision of the board, he is in duty bound not to bargain with, a law-abiding employer would be in an unenviable position if he could not get injunctive relief . . . . The statute does not make the strike illegal. But the statute imposes a duty upon the employer, and a strike to compel a person to violate his legal duty may be held illegal on common law principles."

Compare, however, Section 13 of the Act: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

<sup>79</sup> Section 8(3).

difficult situations cloud the avowed purposes of the Act as expressed by its proponents under the attacks of its detractors.

2. State Labor Relations Acts—Five states<sup>80</sup> enacted legislation conforming substantially to the federal act and designed to promote collective bargaining in industries not engaged in interstate commerce. Because of the similarity in pattern, it will be sufficient, in analyzing these "little Wagner Acts," to concentrate upon the points of divergence.

The Massachusetts State Labor Relations Act,<sup>81</sup> section 4A, lists the "sit-down" strike as an unfair labor practice. The importance of this innovation should not be underestimated, since it marked the introduction of restraints upon labor organizations through the medium of the labor relations act. Section 10(a), providing that "Wherever the application of the provisions of any other law of this commonwealth conflicts with the application of the provisions of this act, this chapter shall prevail," entails the definite supersession of the Massachusetts Anti-Injunction Act<sup>82</sup> in case of conflict<sup>83</sup> with the Labor Relations Act.

The legislature of the State of New York, in the State Labor Relations Act,<sup>84</sup> departed in a number of respects from the federal act. By definition, the term "employee" does not include "any individuals employed only for the duration of a labor dispute,"<sup>85</sup> and the

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<sup>80</sup> Massachusetts, New York, Pennsylvania, Utah, Wisconsin. The Wisconsin Act was repealed, the Pennsylvania Act modified, in 1939.

<sup>81</sup> *Massachusetts, Acts of 1938*, c. 345. The act originally passed, of which the present act is a recodification, was cited as *Laws of 1937*, c. 436.

<sup>82</sup> *Laws of 1935*, c. 407.

<sup>83</sup> The only reference to the federal anti-injunction act contained in the National Labor Relations Act is found in section 10(h) of the latter: "When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes" approved March 23, 1932."

<sup>84</sup> *Cabills Consolidated Laws of New York, Laws 1937*, c. 443.

<sup>85</sup> *Ibid.*, Sec. 701(3). This express declaration of the New York Act, however, must be implied in the National Act, else an employer might find himself with alternative sets of "employees." The strike-breaker, whether furnished by agency or rival union, is deprived by this definition of any recourse to the remedies in the Act, in the event of future discharge.

term "representatives" is broadened to include "a labor organization or an individual whether or not employed by the employer of those whom he represents";<sup>86</sup> while the meaning of "company union" is annotated more fully.<sup>87</sup> The list of unfair labor practices is extended to ten.<sup>88</sup>

Section 705, outlining the procedure governing election and certification, contains several novel clauses. First, to the majority rule proviso has been adjoined the statement that valid representation may be decided "by the majority of the employees voting in an election."<sup>89</sup> Second, the power of the labor board to determine the proper voting unit is qualified, inasmuch as "in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining."<sup>90</sup> Third, an employer may request the Board to investigate an alleged controversy concerning representation.<sup>91</sup> Fourth, a run-off election, in which the two nominees receiving the greatest number of votes on the first ballot participate, is declared the proper procedure when no one of three or more candidates re-

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<sup>86</sup> *Ibid.*, Sec. 701(4).

<sup>87</sup> *Ibid.*, Sec. 701(6).

<sup>88</sup> *Ibid.*, Sec. 704.

<sup>89</sup> *Ibid.*, Sec. 705(1).

<sup>90</sup> *Ibid.*, Sec. 705(2). This has the effect of fortifying the position of trade unions organized along craft rather than industrial lines. The Massachusetts Act has recently been amended similarly. See *Laws 1939*, c. 318.

<sup>91</sup> *Ibid.*, Section 705(3). The Board *must* pursue an investigation of controversies when the request is submitted by employees, but *may* do so, at its option, when requested by an employer. However, "... no election shall be directed by the board solely because of the request of an employer or of employees prompted thereto by their employer." (Section 705(4)). Section 9(c) of the federal act gives the N. L. R. B. procedural discretion. The Rules and Regulations of that body, as amended April 27, 1936, provided only that "a petition requesting the Board to investigate and certify under Section 9(c) of the Act the name or names of the representatives designated or selected for the purpose of collective bargaining may be filed by any employee or any person or labor organization acting in his behalf." (Art. III, Sec. 1). However, this regulation was modified in July, 1939, to permit employer petition, with the proviso that "the Board shall not direct an investigation on a petition filed by an employer unless it appears to the Board that two or more labor organizations have presented to the employer conflicting claims that each represents a majority of the employees in the bargaining unit or units claimed to be appropriate." (Article III, Section 3). The regulations of the New York State Board, Nov. 22, 1937, Article III, Section 3, are not as stringent.

ceives an initial majority,<sup>92</sup> eliminating possible selection of exclusive representatives by a mere plurality of the votes cast. Fifth, "the board shall not have authority to investigate any question or controversy between individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization."<sup>93</sup>

Section 712 specifies that "insofar as the provisions of this article are inconsistent with the provisions of any other general, special, or local law, the provisions of this article shall be controlling."

The original Pennsylvania Labor Relations Act<sup>94</sup> offered fewer departures from the federal pattern. Only insofar as organizations "which, by ritualistic practice, constitutional or by-law proscription, by tacit agreement among . . . members, or otherwise [deny] a person or persons membership in [their] organization on account of race, creed, or color"<sup>95</sup> are denied the status of "labor organizations," was there any significant difference. The Utah Labor Relations Act<sup>96</sup> conforms in all important respects to the federal law.

The Wisconsin Labor Relations Act,<sup>97</sup> which was replaced in 1939 by the Wisconsin Employment Peace Act, contained so many innovations that it could scarcely be regarded as a variant of the basic federal pattern. Particularly pertinent to rival unionism were the minority status and closed shop provisions. While representatives selected by a majority of the employees bargained for all, a material qualification was appended, reading: "Nothing herein shall prohibit any employe, or minority or majority group of employes, from declaring a labor dispute to exist respecting a controversy over representation, and such employe or minority or majority group of employes shall have the benefit and protection of sections 103.51 to

<sup>92</sup> *Ibid.*, Section 705(5).

<sup>93</sup> *Ibid.*, Section 705(3). Here, a definite line is drawn between jurisdictional and rival union disputes. The rationale, of course, is that where there already exists an agency for the settlement of disputes, the board should not be permitted to intervene. Whether the distinction should be made, in view of the long and violent history of jurisdictional disputes in this country, is at least questionable. See James M. Landis, *Cases on Labor Law* (Chicago, 1934), p. 319, note 3.

<sup>94</sup> *Purdon's Pennsylvania Stat. Anno*, 1937 Supp: Laws of 1937, Act No. 294.

<sup>95</sup> *Ibid.*, Sec. 3(f).

<sup>96</sup> *Utah Revised Stat. Anno*, Laws 1937, c. 55.

<sup>97</sup> *Laws of Wisconsin*, 1937, c. 51.

103.64 [the Wisconsin Anti-Injunction Act] pertaining to labor disputes,"<sup>98</sup> thus answering a particularly puzzling question. The closed-shop, or "all-union agreement" as it was termed in the act, was furthered by the provision that "Nothing contained herein shall be deemed to prevent an employer from entering into an 'all-union agreement,' as hereinbefore defined, with a labor organization or labor organizations."<sup>99</sup> To be considered a "labor organization," a union had merely to conform to the technical listing requirements specified,<sup>100</sup> and any listed organization, whether or not it represented a majority of the employees in a given unit, could validly contract for the closed shop with an employer.<sup>101</sup> The legislative intent on this point was made doubly clear by qualifying the employer's duty to refrain from interfering with his employees' choice of union to the same extent.<sup>102</sup>

For the rest, outstanding features included denial of employee status to persons replacing employees whose work had ceased as a consequence of a labor dispute;<sup>103</sup> detailed exposition of the term "company union";<sup>104</sup> creation of additional unfair labor practices;<sup>105</sup>

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<sup>98</sup> *Ibid.*, Sec. 111.09(1).

<sup>99</sup> *Ibid.*, Sec. 111.07.

<sup>100</sup> *Ibid.*, Section 111.06(2). The requirements for listing were merely the filing of information relating to the organization and officialdom of the union, and persuasion of the labor board that the petitioning union was not a statutory "company union." The Act provided that "No other qualification for inclusion shall be laid down."

<sup>101</sup> Max Lerner in *The Nation*, May 14, 1938, p. 555, attributes this rather odd provision to Joseph Padway, general counsel to the American Federation of Labor, who sought to protect minority craft unions. For adverse comment upon this plan by a pro-labor publication, see "State Labor Relations Acts," 6 *I. J. A. Bull.* No. 1 (1938).

<sup>102</sup> *Ibid.*, Section 111.08(2) ". . . it should be noted that 111.08(3) does not in terms prohibit an employer from *encouraging* membership in a labor organization for proper purposes, but merely from discouraging membership. Thus the Wisconsin Act does not prevent employers from assisting in recruiting membership in listed organizations. The National Act, on the other hand, makes it an unfair labor practice for an employer either to encourage or to discourage membership in any labor organization. However, as previously explained, the term 'labor organization' in the National Act, includes organizations dominated by employers, while the term as used in the Wisconsin Act means only genuine unions which have been listed by the Board." Feinsinger and Rice, *The Wisconsin Labor Relations Act* (Bulletin of the University of Wisconsin, June 1937), p. 39.

<sup>103</sup> *Ibid.*, Section 111.02(3).

<sup>104</sup> *Ibid.*, Section 111.02(6).

<sup>105</sup> *Ibid.*, Section 111.08.

grant of permission to the board to "decline jurisdiction in any case where it believes that the policies of this chapter will be better promoted by not acting";<sup>106</sup> empowering the board to arbitrate<sup>107</sup> and appoint conciliators<sup>108</sup> under certain circumstances; and the setting up of labor and employer committees to investigate labor practices and stimulate the honoring of collective agreements.<sup>109</sup> The act was given priority over previous legislation,<sup>110</sup> but it was clearly stated that "Nothing in this chapter shall be construed so as to interfere with or impede or diminish in any way the right to strike, or to deprive any party to a labor dispute as defined in this chapter and in sections 103.51 to 103.64 [anti-injunction law] of the rights, benefits, and protection of sections 103.51 to 103.64."<sup>111</sup>

#### D. RECENT RESTRICTIONS UPON THE ALLOWABLE AREA

The spring of 1939 brought with it an abrupt termination of the increasingly liberal legislative treatment of labor organizations. Republican victories at the polls in 1938, in addition to a strong public reaction against the needless strife engendered by the C. I. O.-A. F. of L. controversy, contributed toward the passage of several severely restrictive state statutes. One of their major purposes was to limit the scope of rival union warfare by imposing novel interdictions upon the employment of the most common trade union weapons under such circumstances, and by closing several of the gaps left by the superimposition of the labor relations acts upon the anti-injunction acts. That the states affected were among those which had previously been regarded as progressive eloquently attests to the extent of the damage produced by the national cleavage in the ranks of labor.

1. **Anti-Injunction Laws**—The principal attack has been directed against the very heart of the anti-injunction statutes—the "labor dispute" definition. The most drastic modification is to be

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<sup>106</sup> *Ibid.*, Section 111.09(2).

<sup>107</sup> *Ibid.*, Section 111.12.

<sup>108</sup> *Ibid.*, Section 111.16.

<sup>109</sup> *Ibid.*, Section 111.15.

<sup>110</sup> *Ibid.*, Section 111.18.

<sup>111</sup> *Ibid.*, Section 111.17.

found in the Oregon Initiative Petition,<sup>112</sup> in which a labor dispute is defined to include

only an actual bona fide controversy in which the disputants stand in proximate relation of employer and the majority of his or its employees and which directly concern matters directly pertaining to wages, hours, or working conditions of the employees of the particular employer directly involved in such controversy. Disputes between organizations or groups of employees as to which shall act for the employees in dealing with the employer shall not be classed as labor disputes, and the refusal of an employer to deal with either party to any such jurisdictional controversy shall not operate to make the dispute a labor dispute within the meaning of this act.<sup>113</sup>

Not only have rival union disputes been placed beyond the statutory pale, and therefore made subject to injunctive decree, but the scope of legitimate industrial controversies has in effect been narrowed to a point even beyond the notoriously restrictive federal court interpretations of the Clayton Act. The majority rule concept, popularized by the labor relations acts, proved in this instance to be a boomerang through the imposition of unprecedented prerequisites to the use of economic coercion. The requirement of proximate relationship, the redundant use of the word "direct," run exactly counter to the intent and purpose of Congress and the various state legislatures as expressed in the earlier anti-injunction acts. The almost gratuitous addendum eliminating representation<sup>114</sup> as a possible controversial subject can be traced directly to the destructive internecine strife that threatened to destroy the prosperous Oregon lumber industry.

Only slightly less severe are the terms of the new Wisconsin sections:

The term "labor dispute" means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute.<sup>115</sup>

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<sup>112</sup> *Laws* 1939, c. 2. The constitutionality of this measure was upheld in *A. F. of L. v. Bain*, 4 Labor Relations Reporter 824 (Cir. Ct. 1939).

<sup>113</sup> *Ibid.*, Section 1.

<sup>114</sup> Although the term "jurisdictional" dispute is employed, there is little doubt, in view of the general purpose of the statute as a whole and of the remaining verbiage of the section, that it is intended to cover rival union disputes.

<sup>115</sup> *Wisconsin, Laws of 1939*, c. 25, Section 103.62.

The detail of the Oregon statute is lacking here, but the courts can, and probably will, interpret the two in substantially similar fashion. "Proximate relationship" may be amply inferred from the pronoun "his" prefacing the enumeration of party employees, and the majority requirement is simply but forcefully stated. In only one important respect do the two acts appear to differ: the Wisconsin definition is apparently broad enough to include a representation dispute where the majority union and the employer are the disputants, since this might be considered part of the "process" or "details" of collective bargaining. Another possible distinction arises from the fact that although the Oregon Act may be construed in such a way as to limit a dispute to a majority of employees as such, thus excluding a labor organization representing that majority, the Wisconsin act specifically provides for union representation.

The rationale of the Pennsylvania amendments is somewhat different. The labor dispute definition is left unchanged, but the anti-injunction act is made inapplicable to the following cases:

(a) Involving a labor dispute, as defined herein, which is in disregard, breach or violation of, or which tends to procure the disregard, breach or violation of, a valid, subsisting labor agreement arrived at between an employer and the representatives designated or selected by the employees for the purpose of collective bargaining as defined and provided for in the [state labor relations] act . . . or as defined and provided for in the National Labor Relations Act . . . provided, however, that the complaining person has not, during the term of the said agreement, committed an act as defined in both the aforesaid acts as an unfair labor practice or violated any of the terms of said agreement (b) Where a majority of the employees have not joined a labor organization, or where two or more labor organizations are competing for membership of the employees, and any labor organization . . . engages in a course of conduct intended or calculated to coerce an employer to compel or require his employees to prefer or become members of or otherwise join any labor organization (c) Where any person, association, employee, labor organization . . . engages in a course of conduct intended or calculated to coerce an employer to commit a violation of the Pennsylvania Labor Relations Act of 1937 or the National Labor Relations Act of 1935 . . . ."<sup>116</sup>

Upon analysis, the Pennsylvania amendments appear to approximate the effects of the Wisconsin law. Subsection (a) of the former prohibits attempts to induce the breach of statutory agreements, which includes exclusive bargaining contracts with majorities and "members-only" minority agreements when there is no majority union; but the same result is accomplished by the Wisconsin re-

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<sup>116</sup> *Pennsylvania, Laws of 1939, Act No. 163, Section 4.*

quirement of a majority for a "labor dispute." Majority attempts upon minority contracts, however, would receive the protection of both statutes, since in Pennsylvania such contracts do not conform to the terms of the labor relations act,<sup>117</sup> whereas in Wisconsin the majority union constitutes a proper party to a "labor dispute." The proviso to subsection (a) merely writes into the law the equitable maxim of "clean hands."<sup>118</sup>

Subsection (b) returns to the courts unhampered jurisdiction over rival union disputes. Although the statute speaks of "coercion," that element can be read into most of the activities of rival unionism. Moreover, there is grave danger that the clause "or where two or more labor organizations are competing for membership of the employees" creates an exception to the implied majority privileges contained in the act (unless the conjunction "or" is interpreted to mean "and" in rival union situations), in which case the entire subsection would apply only when "a majority of the employees have not joined a labor organization." If the latter construction is adopted, the mere presence of a competing union, no matter how insignificant, would place a majority union strike and picketing beyond the statutory pale.<sup>119</sup>

Subsection (c) answers the difficult questions raised by the *Union Premier Food Stores* case,<sup>120</sup> discussed below. If an employer is engaged in collective bargaining with the representatives of a majority of his employees, the courts of Pennsylvania are not bound by the terms of the anti-injunction act in considering an application for equitable relief against the actions of an invading union seeking the rupture of the relationship thus established.

Although the Minnesota Anti-Injunction Act itself remains undisturbed, it has in effect been modified by Sections 11(d) and 14

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<sup>117</sup> The exception would be a contract with a minority union which, at the time the agreement was concluded, possessed a majority. This contract is protected specifically by the Pennsylvania Labor Relations Act, *infra*, p. 142.

<sup>118</sup> Subsection (a) may be of great help to labor unions in that it removes the statutory difficulties in the way of enjoining contract breaches by employers.

<sup>119</sup> See *Flashner v. Amalgamated Meat Cutters*, C. C. H. par. 18,458 (Com. Pleas, Pa. 1939).

<sup>120</sup> *Union Premier Food Stores v. Retail Food Clerks Union*, 98 Fed. (2d) 821 (1938).

of the newly enacted Minnesota Labor Relations Act.<sup>121</sup> The specific changes entailed will be considered below in connection with the labor relations acts.

Under the Oregon<sup>122</sup> and Wisconsin<sup>123</sup> statutes, picketing and boycotting in the absence of a "labor dispute" are declared unlawful. Minority unions are thus deprived of the privilege of picketing, and must confine themselves to persuasion of employees until enough have been weaned away from a rival majority organization to constitute a new majority. By the same token, "outside" unions may not picket for the purpose of unionizing an establishment until they have secured the allegiance of a majority of employees within that establishment—in other words, until they have unionized it. One of labor's most important expansive weapons is thereby rendered useless.

The Pennsylvania amendments do not illegalize picketing of this type, but merely remove it from the protecting wing of the anti-injunction act. Nevertheless, by this bald exclusion, the legislature has created a potent implication as to the undesirability of courses of conduct "intending or calculated to coerce," which the courts will be constrained to follow. Minority picketing in the presence of a majority comes under the ban of subsection (c), assuming that the purpose of the picketing is to induce the employer to bargain with the picketing organization. In the absence of a recognized majority, minority picketing would run afoul of subsection (b), it being quite conceivable that such conduct would be construed as

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<sup>121</sup> *Minnesota, Laws of 1939, c. 440.*

<sup>122</sup> *Laws of 1939, c. 2, Section 3:* "It shall be unlawful for any person, persons, association or organization, to picket or patrol, or post pickets or patrols, in or near the premises or property owned, occupied, controlled or used by an employer or employers unless there is an actual bona fide existing labor dispute between said employer or employers and his or their employees. It shall also be unlawful to boycott directly or indirectly any employer, or the business of such employer, not directly involved as a party in a labor dispute."

<sup>123</sup> *Wisconsin, Laws of 1939, c. 25, Section 103.535:* "It shall be unlawful for anyone to picket, or induce others to picket the establishment, employes, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business, or interfere with any person or persons desiring to transact or transacting business with him, when no labor dispute, as defined in subsection (3) of section 103.62, exists between such employer and his employes or their representatives."

calculated to coerce the employer into requiring his employees "to prefer or become members of or otherwise join any labor organization." If it were maintained that the sole purpose of the picketing was to procure a "members-only" contract, the courts might allow it,<sup>124</sup> but even here unions cannot await with equanimity the approach of generally hostile courts to the vague and uncertain "prefer."

Although there is no place here for a comprehensive review of municipal picketing ordinances,<sup>125</sup> at least brief mention should be made of the controversial Los Angeles law. A "bona fide strike" is therein defined as one authorized by a majority of employees through secret ballot, and picketing in the absence of such a strike is unlawful. If there is a bona fide strike, picketing may be employed subject to certain strict regulations including written authorization to each picket by the majority organization, specification of the placards used, and limitation upon the number of pickets. Minority picketing is thus completely inhibited.<sup>126</sup>

2. **The Labor Relations Acts**—Several states have adopted new labor relations laws, modeled in part upon the National Labor Relations Act but containing additional "equalizing" provisions to meet the common accusation of one-sidedness levied against the federal statute. As in the case of the anti-injunction acts, special attention was paid to rival union disputes.

*Minnesota*—The Minnesota Labor Relations Act<sup>127</sup> makes it an unfair labor practice "For any person to picket or cause to be picketed a place of employment of which place said person is not an employee while a strike is in progress affecting said place of

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<sup>124</sup> If there are competing unions, however, it is extremely doubtful whether picketing for this purpose is permissible.

<sup>125</sup> For material on this subject, see: "Ordinances Restricting the Right to Picket," 38 *Columbia Law Review* 1521 (1938); "Constitutionality of Anti-Picketing Ordinances," 48 *Yale Law Journal* 308 (1938).

<sup>126</sup> This fact has been made the basis for an attack upon the constitutionality of the ordinance. A California lower court judge found that there was an unconstitutional discrimination between majorities and minorities in violation of the 14th Amendment. *People v. Gidaly*, 4 *Labor Relations Reporter* 826 (1939). Cf., however, *In re Gladstein*, 4 *Labor Relations Reporter* 110 (1939).

<sup>127</sup> *Laws of 1939*, c. 440.

employment, unless the majority of persons engaged in picketing said place of employment at said times are employees of said place of employment"<sup>128</sup> and "For any employee, labor organization or officer, agent or member thereof to compel or attempt to compel any person to join or to refrain from joining any labor organization or any strike against his will by any threatened or actual unlawful interference with his person, immediate family or physical property, or to assault or unlawfully threaten any such person while in pursuit of lawful employment."<sup>129</sup> The commission of these acts is declared to be unlawful,<sup>130</sup> and they may be enjoined in equity regardless of the anti-injunction act.<sup>131</sup>

Standing alone, these sections do not curtail picketing by minority organizations. Minority union members who are employees of the employer concerned may impliedly picket at all times in the event of a strike, while non-employee members may picket as long as the majority of those on the picket line are employees. However, section 6 of the Act, which provides that "any representative of employees or labor organization" desirous of securing a contract or some change in working conditions, must give written notice to the employer, and, failing to secure compliance with its request within ten days, must serve ten days' notice of intent to strike upon the labor conciliator and all other parties to the dispute, may serve to reduce minority picketing to a bare minimum. Since a strike in violation of section 6 is both unlawful and an unfair labor practice,<sup>132</sup> a union is seriously handicapped unless it is a "representative of employees" entitled to make demands upon the employer and file the requisite strike notice. Section 1(d) defines a representative of employees as "a labor organization or one or more individuals selected by a group of employees as provided in section 16 of this act," and Section 16 enunciates the majority rule. "Labor organization" is separately defined,<sup>133</sup> it is true, and section 6 specifies "any representative of employees *or* labor organization." [Italics mine]

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<sup>128</sup> *Ibid.*, Section 11(d).

<sup>129</sup> *Ibid.*, Section 11(g).

<sup>130</sup> *Ibid.*, Section 11(h).

<sup>131</sup> *Ibid.*, Section 14.

<sup>132</sup> *Ibid.*, Section 11(b).

<sup>133</sup> *Ibid.*, Section 1(e).

Nevertheless, in view of the exclusive bargaining privileges accorded the majority representatives, it is questionable whether a minority union, in the presence of a rival majority, can effectuate its "desire to negotiate a collective bargaining agreement or make any change in any existing agreement or . . . in the rates of pay, rules or working conditions" by making demands upon the employer and following the necessary procedural steps prior to the calling of a strike, since it is preordained that the employer's only answer can be a refusal to negotiate. An opposite interpretation would render the strike-delaying provisions meaningless, and a construction to this effect will therefore not be adopted. However, even in the absence of a strike, a minority, or any union, may use one picket for each entrance to a plant without violating the act.<sup>134</sup>

A question of representation may be raised by employers as well as employees. The labor conciliator, who administers the act, may decide upon the appropriate unit, provided, however, "that when a craft exists, composed of one or more employees, then such craft shall constitute a unit appropriate for the purpose of collective bargaining for such employee or employees belonging to said craft and a majority of such employees of said craft may designate a representative for such unit."<sup>135</sup> Certification lasts for one year unless it appears to the conciliator that sufficient reason exists for considering the matter anew before that time.

*Pennsylvania*—The 1939 amendments to the Pennsylvania Labor Relations Act<sup>136</sup> modify the previous law in many important respects. A new section 6(2) establishes employee unfair labor practices, among which are included intimidation or coercion of an employee to compel him "to join or to refrain from joining any labor organization, or for the purpose or with the intent of influencing or affecting his selection of representatives for the purposes of collective bargaining,"<sup>137</sup> the sit-down strike,<sup>138</sup> and coercion of an em-

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<sup>134</sup> *Ibid.*, Section 11(e): "It shall be an unfair labor practice: (e) For more than one person to picket or cause to be picketed a single entrance to any place of employment where no strike is in progress at the time."

<sup>135</sup> *Ibid.*, Section 16(b).

<sup>136</sup> *Pennsylvania, Laws of 1939*, Act. No. 162.

<sup>137</sup> *Ibid.*, Section 6(2)(a).

<sup>138</sup> *Ibid.*, Section 6(2)(b).

ployer.<sup>139</sup> Employer unfair labor practices are ingeniously altered to provide additional impediments to labor unions. To the regular closed shop proviso is added the requirement that the contracting union must not deny admission to membership to non-union employees at the time the agreement is reached,<sup>140</sup> while the check-off is rendered unfair unless the employer is "authorized so to do by a majority vote of all the employees in the appropriate collective bargaining unit taken by secret ballot, and unless he thereafter receives the written authorization from each employee whose wages are affected."<sup>141</sup>

Bearing more directly on rival unionism are several mutations in the electoral procedure and in regulations affecting collective agreements. The craft autonomy modification of the unit rule, advocated by the American Federation of Labor, is adopted.<sup>142</sup> A petition for determination of representatives may be filed by a labor organization, an employer, or the representative of 30 per cent or more of the employees within an appropriate bargaining unit.<sup>143</sup> Certification is made binding for one year "or for a longer period if the contract so provides,"<sup>144</sup> and may be appealed from by defeated unions to the courts.<sup>145</sup>

Section 7(c) resolves the question of the permanence of collective agreements in the face of shifting majorities by making certification coextensive with the life of contracts "even though the unit may have changed its labor organization membership." Further stability is imparted by an addendum to section 8(d), which entitles agreements to full effect "unless the board specifically finds that these provisions involve the commission of an unfair labor practice within the meaning of clause (c) of subsection (1) of section Six of this Act."<sup>146</sup>

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<sup>139</sup> *Ibid.*, Section 6(2)(c).

<sup>140</sup> *Ibid.*, Section 6(c).

<sup>141</sup> *Ibid.*, Section 6(f).

<sup>142</sup> *Ibid.*, Section 7(b).

<sup>143</sup> *Ibid.*, Section 7(c).

<sup>144</sup> *Idem.*

<sup>145</sup> *Ibid.*, Section 7(d).

<sup>146</sup> The clause referred to, Section 6(1)(c), is the analogue of Section 8(3) of the National Labor Relations Act.

When this act is read in conjunction with the revised anti-injunction act, it is apparent that the position of an existing union, enjoying contractual relationships with an employer, has been greatly enhanced, whereas the path of aspiring contenders is strewn with additional obstacles. Where there are closed shop contracts, representation shifts before their expiration are virtually impossible. Minority unions must not only refrain from bringing economic coercion against employers, but will also come up against the blank wall of rival union long-term contracts in attempting to win over their fellow workers.

*Wisconsin*—Just as the old Wisconsin Labor Relations Act was the most unorthodox of all the state acts, so the new Wisconsin Employment Peace Act<sup>147</sup> contains novelties that will require much judicial clarification. The declaration of policy marks a shift from the emphasis upon the rights of employees that dominates the National Labor Relations Act. Three major groups, the public, employees and employers, are considered to be equally concerned and entitled to the equal solicitude of the statute.

The most important provisions affecting rival union disputes are contained in the detailed list of employer unfair practices:

(a) An all-union, or closed-shop agreement may be concluded only where "three-quarters or more of the employees in such collective bargaining unit shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board."<sup>148</sup> The agreement may be ordered terminated if the board finds that the union involved has unreasonably refused to admit to membership any employee of the contracting employer. The previous status of closed-shop contracts is thus radically altered, but a minority union which can muster more than 25 per cent of the employees is protected against total extinction.

(b) An employer may permit "employee organizational activities on company premises or the use of company facilities where such activities or use create no additional expense to the company"<sup>149</sup> at the request of the majority representatives. The effect of this

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<sup>147</sup> *Laws of 1939*, c. 57. The Wisconsin Labor Relations Act, *Laws of 1937*, c. 51, was repealed thereby.

<sup>148</sup> *Ibid.*, Section 111.06(c).

<sup>149</sup> *Ibid.*, Section 111.06(b).

section is to make more impregnable the situation of established unions favored by the employer.

(c) Where an employer files a petition for an election, as he is permitted to do, "he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the board."<sup>150</sup> The employer's "dilemma" when confronted with competing unions is thus eliminated.

(d) It is an unfair labor practice for an employer to bargain with the representatives of less than a majority of his employees in an appropriate unit.<sup>151</sup> There is no qualification to provide for situations where there is no majority group, so that collective bargaining appears to be precluded unless there is a single majority organization. This is fortified by the precise definition of collective bargaining as "negotiating by an employer and a *majority* of his employees . . . concerning representation or terms and conditions of employment . . . ." <sup>152</sup>[Italics mine]

The list of practices forbidden to employees, in addition to general prohibitions of coercion of employers and fellow employees,<sup>153</sup> contains the following interdiction: "To cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."<sup>154</sup> Since the anti-injunction act similarly declares such acts unlawful, the employer is offered alternative modes of procedure against minority strikes. He may go directly to a court of equity, or he may appeal to the Employment Relations Board for a cease and desist order and a one year suspension of the rights, im-

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<sup>150</sup> *Ibid.*, Section 111.06(d). The National Labor Relations Board, however, has not penalized employers who refuse to bargain because of honest doubt as to the identity of the representative of the majority.

<sup>151</sup> *Ibid.*, Section 111.06(e).

<sup>152</sup> *Ibid.*, Section 111.02(5).

<sup>153</sup> Section 111.06(2)(a) forbids coercion of an employee in the enjoyment of his specific right, stated in Section 111.04, to *refrain* from joining an organization and engaging in collective bargaining.

<sup>154</sup> *Ibid.*, Section 111.06(2)(e).

munities, privileges or remedies granted by the Act to the respondent organization.<sup>155</sup>

In electoral procedure, the unit of representation is an employer unit, "except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot . . . to constitute such group a separate bargaining unit they shall be so considered."<sup>156</sup> The ballot must include the names of all persons submitted by an employee or group of employees, but a person or organization that has committed an unfair labor practice may be disqualified.<sup>157</sup> Employees must be accorded the opportunity of voting against all the proposed representatives. "The fact that one election has been held shall not prevent the holding of another election among the same group of employes, provided that it appears to the board that sufficient reason therefor exists."<sup>158</sup>

The employer's position is considerably bolstered and that of the employees equally weakened by the stipulation that the status of employee, although adhering to an individual "whose work has ceased solely as a consequence of or in connection with any current labor dispute," is restricted to one "who has not been absent from his employment for a substantial period of time during which reasonable expectancy of settlement has ceased (except by an employer's unlawful refusal to bargain) and whose place has been filled by another engaged in the regular manner for an indefinite or protracted period and not merely for the duration of a strike or lockout."<sup>159</sup> Although the board must decide in each individual case what constitutes a "substantial period of time," the employer is given greater freedom in hiring replacements and entering into collective agreements with their representatives.

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<sup>155</sup> *Ibid.*, Section 111.07(4). It is interesting to note that the cease and desist orders issued by the Employment Relations Board and directed against trade unions look for all the world like the familiar equitable injunction. See the case of Allen-Bradley Co., Wis. E. R. B., Case No. 6 (1939).

<sup>156</sup> *Ibid.*, Section 111.02(6).

<sup>157</sup> Thus, if a strike were called by a minority union, or by a majority union without the formality of a secret ballot, such action might disqualify the union from participating in future elections.

<sup>158</sup> *Ibid.*, Section 111.05(4).

<sup>159</sup> *Ibid.*, Section 111.02(3)(d).

*Michigan*—The Michigan Labor Relations Act<sup>160</sup> is an abbreviated version of the other labor relations laws. The unfair labor practices specified are few, general in tenor, and are punishable as misdemeanors. There is no mechanism for the determination of employee representatives, the chief reliance being placed upon mediation and strike-delaying provisions. Closed shop contracts with majority organizations are sanctioned, and by implication similar agreements with minorities forbidden.<sup>161</sup>

#### E. THE PROPOSED AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT

At the close of 1938, Congress was urged by groups representing both organized labor and employers to revise the Wagner Act in the light of the experience of the past three years. In response to this pressure, a number of bills were introduced in both houses<sup>162</sup> and lengthy hearings held before the Senate Committee on Education and Labor<sup>163</sup> and the House Committee on Labor.<sup>164</sup> Discussion of the amendments designed to cope with the problems of rival unionism can be confined largely to a consideration of the two most significant sets of bills—the Walsh (S. 1000) and Barden (H. R. 4749) bills, sponsored by the American Federation of Labor, and the Burke (S. 1580) and Hoffman (H. R. 4990) bills, which had the support of the National Association of Manufacturers and other employer organizations.

1. **The Jurisdiction of the Board**—None of the proposals was designed to remove rival union controversies from the purview of the N. L. R. B. There was some difference of opinion, however, over jurisdictional disputes. The Walsh bill, by a proviso to the present section 9(c), would deny the Board power "to investigate

<sup>160</sup> *Laws of 1939*, Public Act No. 176.

<sup>161</sup> *Ibid.*, Section 14.

<sup>162</sup> 75th Congress, 1st Session, 1939: S. 1000, S. 1264, S. 1392, S. 1550, S. 1580, S. 2123, H. R. 2761, H. R. 4749, H. R. 4990.

<sup>163</sup> Hearings Before the Committee on Education and Labor, U. S. Senate, 76th Congress, 1st Session, April 11, 1939 to August 4, 1939, hereinafter referred to as *Senate Hearings*.

<sup>164</sup> Hearings Before the Committee on Labor, House of Representatives, 76th Congress, 1st Session, May 4, 1939 to July 26, 1939, hereinafter referred to as *House Hearings*.

any question or controversy between individuals or groups within the same labor organization or between labor organizations affiliated with the same labor organization." On the other hand, a number of witnesses recommended that the Board be *required* to exercise authority over jurisdictional disputes.<sup>165</sup> The trade unions gave evidence of strenuous opposition to mandatory investiture of such power and Mr. Joseph Padway, appearing for the A. F. of L., stated that should the Board ever attempt to intervene in this situation, "all of the troubles it has gotten into will be pimples as compared with a boil."<sup>166</sup> In view of the complex nature of jurisdictional disputes<sup>167</sup> and labor's long tradition of jealous guardianship of the right to decide them, the establishment of the Board as an umpire might well arouse such a tempest as to imperil the very operation of the Act. The Board, however, should be left free to adjudicate these conflicts when requested to do so by all the parties concerned or when their continuation might result in regional or even national industrial disorganization.<sup>168</sup>

2. **The Appropriate Unit**—The American Federation of Labor proposed, through the Walsh bill, that "when a craft exists, composed of one or more employees, then such craft shall constitute a unit appropriate for the purpose of collective bargaining for such employee or employees." The purpose of this amendment, embodying one of the chief demands of the Federation, is to overcome the alleged bias of the Board in favor of the C. I. O. on the question of the appropriate unit.<sup>169</sup>

The N. L. R. B., in its report to the Senate Committee, presented an analysis of its unit decisions designed to establish its complete

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<sup>165</sup> *Senate Hearings*, pp. 960-963, 3223-3234, 3599; *House Hearings*, pp. 210, 1352, 1799-1817.

<sup>166</sup> *Senate Hearings*, p. 1097.

<sup>167</sup> See testimony of E. L. Oliver, *Senate Hearings*, pp. 3535-3544; of William Leiserson, *idem*, pp. 993-1005.

<sup>168</sup> Testimony purporting to show the serious consequences of large scale jurisdictional controversies may be found in the *Senate Hearings*, pp. 47-52, 194-195, 876 ff., 934-961, 1221, 1480, 1528, 2856, 3432 ff. See also, for a comprehensive discussion of the problem, Louis L. Jaffe, "Inter-Union Disputes in Search of a Forum," 49 *Yale Law Journal* 424 (1940).

<sup>169</sup> Testimony of Mr. William Green, *Senate Hearings*, pp. 632, 668, 669.

impartiality toward the rival labor organizations.<sup>170</sup> It recommended, however, that consideration be given to the problem of "whether it is practically possible to devise legislation which will assist in resolving the undoubtedly troublesome question of the appropriate bargaining unit."<sup>171</sup> The hearings evoked little constructive reasoning along these lines. The primary difficulty of defining the term "craft" appeared to bar the way to the further consideration of Congressional policy. Mr. Madden remarked that the term "'craft' carries no precise meaning. And even where a definite meaning can be attributed to it, the line between craftsmen and non-craftsmen in many types of work is growing constantly more and more difficult to draw,"<sup>172</sup> while Mr. Leiserson pointed out that "to make a finding as to what constitutes a craft or class is just as difficult as to make a finding of an appropriate bargaining unit."<sup>173</sup> These considerations, with the additional factor of a sharp division of opinion within the ranks of labor as to the proper course to be followed (the C. I. O. is strongly opposed to mandatory craft units),<sup>174</sup> would seem to indicate the undesirability of substituting rigid and predetermined formulae for the present discretion of the Board to decide each case freely upon the particular and peculiar facts involved.

3. **Electoral Procedure**—One of the chief demands presented by employers concerned the right to petition for election. In the course of the hearings, the N. L. R. B. announced that it had liberalized its rules and regulations to permit the filing of representation

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<sup>170</sup> The Board's report may be found in the *Senate Hearings*, pp. 530-540. The interested reader is referred in addition to the testimony of Chairman Madden, *idem*, pp. 227-238, 286-287; of Mr. D. W. Smith, *idem*, p. 1209; of Mr. E. S. Smith, *idem*, pp. 1569-1580; of Mr. Charles Fahy, *idem*, pp. 2351-2374. For substantiation by disinterested parties, see the testimony of R. A. Nixon, *idem*, pp. 2954-2974 and Mr. Harry Shulman, *House Hearings*, pp. 1715 ff.

<sup>171</sup> *Senate Hearings*, p. 487.

<sup>172</sup> *Ibid.*, p. 238.

<sup>173</sup> *Ibid.*, p. 993.

<sup>174</sup> Testimony of Sidney Hillman, *ibid.*, pp. 3767-3798; of Matt Meehan, *idem*, pp. 3798-3829; of Jess Gonzales, *idem*, pp. 3829-3855; of Mervyn Rathbone, *idem*, pp. 3857-3887; of Joseph Curran, *idem*, pp. 3967-3986; of Phillip Van Gelder, *idem*, pp. 4012-4029; of Allen S. Hayward, *idem*, pp. 4041-4065; of Yelverton Cowherd, *idem*, pp. 4109-4119; of Lee Pressman, *idem*, pp. 4189-4345.

pleas by employers under certain restrictive conditions.<sup>175</sup> The employer-sponsored bills, however, would grant this right without any qualification. The danger of such a provision is that employers might call elections before unions had had sufficient time to organize adequately, and the ensuing defeat at the polls would seriously hamper further union activities.<sup>176</sup> The present rules of the Board appear to assure ample protection to the employer who is genuinely embarrassed by the conflicting claims of rival unions.

The Burke bill seeks to give statutory precision to the term "majority" by defining it as "the majority of all the employees eligible to vote in the unit appropriate." The effect of this clause, as the Board pointed out,<sup>177</sup> would be to discourage rather than to encourage collective bargaining. Employers, by subtle intimidation, might prevent large turnouts at elections, and non-union men, by abstaining from voting, would be in a position to impede the representation process.

Several proposals are designed to stabilize collective bargaining by fixing a definite duration for certification. The usual time limit specified is one year.<sup>178</sup> This is not an unreasonable length of time<sup>179</sup> from the point of view of either the employer or the worker, and its adoption would relieve the Board of any possible obligation to conduct elections at unreasonably short intervals.

4. **Collective Agreements**—One of the chief objections to the administration of the Act advanced by the A. F. of L. concerns the Board's occasional invalidation of A. F. of L. contracts.<sup>180</sup> Starting with the premise that coverage by American Federation of Labor

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<sup>175</sup> See *supra*, p. 131, n. 91.

<sup>176</sup> Testimony of William Green, *Senate Hearings*, pp. 681-683; of Joseph Padway, *idem*, pp. 1103-1108; "Why N. L. R. A. Should Not Be Amended," *Legal Department, Congress of Industrial Organizations*, (1939), pamphlet; "Amendments to the Wagner Act," 7 *I. J. A. Bulletin* No. 8 (1939).

<sup>177</sup> *Senate Hearings*, pp. 548-550.

<sup>178</sup> The Hoffman bill provides for a one year certification unless before that time at least 20% of the employees in an appropriate unit present a petition showing a substantial change in membership.

<sup>179</sup> "Now, what is a reasonable period of time? Generally, we think a year." Testimony of Charles Fahy, Counsel to the N. L. R. B., *House Hearings*, p. 1046.

<sup>180</sup> A few C. I. O. contracts have also been invalidated, but the A. F. of L. apparently regards this as irrelevant.

agreements can under no circumstances adversely affect the interests of workers, the Federation maintained that nothing in the Act may be construed to delegate to the Board the power to brand affiliated contracting unions with the stigma of employer domination or control.<sup>181</sup> To correct allegedly erroneous interpretations of the statute, the Walsh bill includes the following proviso:

Nothing in this Act shall be construed to vest jurisdiction in the Board to make any decision or order which has the effect of impairing or nullifying an agreement between an employer and the representative of any of his employees, unless such agreement either (1) is with a company union, or (2) requires as a condition of employment membership in a labor organization which, at the date of the execution thereof, is not the exclusive bargaining agent of the employees covered thereby, or (3) which by its terms deprives the representative designated by a majority in an appropriate unit of the right exclusively to bargain for the employees in such unit.

The A. F. of L. quite frankly bases its espousal of this amendment, the dangers of which are all too apparent,<sup>182</sup> on its ability to capitalize upon its reputation for conservatism by securing preferential treatment from employers. The Board, however, has countered with the argument that regardless of the affiliation or non-affiliation of a preferred union, discriminatory grant of collective bargaining privileges deprives workers of the freedom to choose

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<sup>181</sup> Testimony of William Green, *Senate Hearings*, pp. 646, 654, 655; of Joseph Padway, *idem*, pp. 1167, 1549, 1550, 1552.

<sup>182</sup> " . . . under S. 1000 it would be permissible for an employer to negotiate a valid contract, including a closed-shop contract, with a 'labor organization' even though:

(1) The employer had discriminated against his employees, either by discharge or otherwise, in order to prevent them from joining the union of their own choice or to compel them to join the favored organization; and

(2) The employer had refused to bargain collectively with a rival labor organization having a majority and had thereby so discouraged membership in the rival that the employees had transferred their allegiance to the favored organization; and

(3) The employer had supported the 'labor organization' by

(a) financing it

(b) compensating employees or organizers for services performed in its behalf, or

(c) contributing to it money, services or materials; and

(4) The employer had by any other means restrained or coerced its employees into joining the favored organization or not joining a rival organization."

Report of N. L. R. B., *Senate Hearings*, pp. 514-515.

their bargaining representatives, and is therefore barred.<sup>183</sup> The Board appears to be on sounder ground.

The Walsh bill also contains an interesting clause relating to the allocation of contract rights in the event of representation shifts before the contractual expiration date:

Change of membership in or affiliation with or withdrawal from a labor organization shall not impair the rights conferred by this Act on such exclusive bargaining agent until either (1) the term of any written contract made by it with an employer has expired or (2) one year from the date of execution of such a contract (where the contract extends beyond one year) has elapsed, whichever is first reached. Such labor organization shall have an interest in its own right in said contract for said period.

The National Labor Relations Board, although noting that this provision is not in conflict with its rulings, and indicating its desire for Congressional guidance on this point,<sup>184</sup> nevertheless opposed such a rigid formulation. Apparently impressed with its unwisdom, the A. F. of L. has requested that it be withdrawn.<sup>185</sup> In view of chaotic judicial opinion on the subject, and of the uncertain effects of the proposal itself, it would seem preferable that the topic be held in abeyance pending further administrative experience.

The closed shop received special attention. The Walsh bill, in addition to its other contract provisions, would modify the proviso to Section 8(3) of the present Act so as to legalize closed shop agreements with majority organizations that are not company unions, despite any assistance received by such organizations from employers. If this proposal were adopted, an employer could climax his campaign against a disfavored union by signing a closed shop contract with a more amenable rival as soon as the latter had gained a majority.<sup>186</sup>

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<sup>183</sup> *Senate Hearings*, pp. 510-515. In Appendix B to its report, the Board presented an analysis of all instances in which contracts with nationally affiliated organizations were nullified. *Idem*, pp. 605-614. The attack of the A. F. of L. is answered in full detail in Charles Fahy's statement, *idem*, pp. 2322, 2329-2349, 2771-2775.

<sup>184</sup> *Ibid.*, p. 487.

<sup>185</sup> *Ibid.*, pp. 1172, 1182.

<sup>186</sup> "You certainly permit an employer to enter into a closed-shop contract with a union representing a majority, even though the majority may have been obtained with the assistance or coercion of the employer. You probably permit an employer to enter into a closed-shop contract with a union representing only a minority at the time. Where a closed-shop contract of either kind has been signed, you prevent the Board from considering

The Burke bill, by eliminating entirely the present proviso to Section 8(3), in effect illegalizes the closed shop. This proposal, warmly supported by counsel to the National Association of Manufacturers,<sup>187</sup> harks back to the open-shop drive, and is subject to the same objections that caused its rejection at the time the N. L. R. A. was enacted.<sup>188</sup>

5. **Minority Rights**—The Walsh bill would add to Section 8(5) the following proviso:

Nothing in this Act shall prevent a labor organization or any representative designated by less than a majority of employees in a unit appropriate for collective bargaining from exercising any right created or affirmed by this Act, or from bargaining collectively with an employer, so long as no other labor organization or other representative has been designated by a majority of the employees in such appropriate unit.

According to its sponsors, this clause will clear up any misconceptions relating to permissive bargaining by minorities in the absence of a majority.<sup>189</sup> In addition merely to clarifying existing practice, however, it would also have the unfortunate effect of enabling the employer to help build a pet minority union, perhaps until it gained a majority, by granting it exclusive bargaining privileges.<sup>190</sup>

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the question of representation again, and from holding any election or certifying any other group during the term of the closed-shop contract." Testimony of Lee Pressman, *ibid.*, p. 4259.

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<sup>187</sup> *Ibid.*, p. 2091.

<sup>188</sup> Much has been made of the fact that closed-shop contracts are forbidden under the Railway Labor Act. It is interesting to note that the Railway Labor Executives Association strongly opposed that provision at the time of its adoption. Testimony of Byrl A. Whitney, *ibid.*, p. 2647.

<sup>189</sup> President Green did not claim that the N. L. R. B. had barred minority bargaining, but asserted that the matter was of enough importance to warrant legislative clarification. *Ibid.*, pp. 658, 799.

<sup>190</sup> Chairman Madden gives the following example of what might result: "They are both minority unions, but the employer has picked out one as his favorite and he is making a contract with it and is giving to those members the right of collective bargaining, while at the same time another minority union is refused collective-bargaining rights and thereby its members are in effect forced over into the preferred one, and if this is written, it would mean this, that if you had the XYZ union in the plant with 5 members and the ABC union in the plant with 1,000 members, but it would take 1,500 members in one or the other union to make a majority in the plant, the employer could deal with the XYZ union, which has 5 members, in order to make a collective-bargaining contract with it, and could refuse to make any sort of a contract at all with the ABC union." *House Hearings*, pp. 488-489. It may well be, also, that members-only contracts are in effect exclusive bargaining contracts. See testimony of H. J. Straub, *Senate Hearings*, p. 3916.

The employer bills contain numerous restrictions upon minorities. Section 8 (b) (5) of the Burke bill makes it an unfair labor practice for employees to strike "except in pursuance of an affirmative vote of a majority of the employees in the appropriate unit." Aside from the practical difficulties of securing a speedy and accurate strike vote, it would be highly prejudicial to the interests of unions to prohibit minority strikes. The Burke bill also forbids interference with employers "where the basis of such interference is a dispute among the employees, or among any group or groups of employees or their representatives, or among labor organizations with which any such employees are affiliated." The N. L. R. B. has catalogued its objections to this prohibition as follows: (1) The proviso is vague, and might be construed to forbid types of strikes not contemplated therein; (2) "The provision is broad enough to include a labor dispute between employees or labor organizations where the employer himself is a party to the dispute"; (3) Union strikes opposed by unorganized groups might fall into the forbidden category; (4) The number and importance of rival union strikes has been exaggerated; and (5) The act as it stands provides satisfactory machinery for dealing with this type of situation.<sup>191</sup>

There would be more justification for this type of provision if it were applicable only after the Board had determined the statutory majority representatives. Despite the relative rarity of minority strikes following certification,<sup>192</sup> there is an obvious defect in the Act if an employer can be required to bargain with a union while unable to secure redress against the pressure of a rival labor organization seeking to thwart the bargaining. The N. L. R. B. admitted its inability to cope with this problem, but suggested that the proper palliative is an amendment to the Norris-La Guardia Act.<sup>193</sup> This

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<sup>191</sup> *Senate Hearings*, pp. 297-298.

<sup>192</sup> There is reason to believe that despite the assertions of Mr. Padway (*ibid.*, pp. 297-298), such strikes are not uncommon, and are tending to increase in number. For corroboration of this conclusion, see the testimony of the following witnesses: Robert W. Maxwell, *idem*, p. 977; Herbert J. Schiffauer, *idem*, p. 2279; Thomas C. Nixon, *idem*, pp. 2303-2304; Clyde E. Edmond, *idem*, pp. 1793-1816; A. F. Crystal, *idem*, pp. 1866-1871; Charles Fahy, *idem*, pp. 2875, 2913.

<sup>193</sup> *Ibid.*, pp. 136, 2859, 2860, 2876, 2913.

would seem to be the worse alternative. The author agrees with the convincing arguments of Mr. Robert Maxwell:

The principle now so uniformly endorsed is that matters relating to employee rights and the employee-employer relationship should be handled by specialists who know their job and who have the time, the means, and the training to visualize and grasp the entire situation in a way which is not at all possible through Court action. In view of this policy, why should these specialists on the National Labor Relations Board be handed a broken reed? . . . The National Labor Relations Act, at least with reference to the exercise of the right of collective bargaining, represents the same social and economic philosophy which gave rise to the Norris-La Guardia Act. The principle behind both acts is that the Courts are not the proper place to settle controversies between employer and employees, or employee and employee, or their respective organizations. The Board created by the act is the designated medium before which such controversies should be settled.<sup>194</sup>

The concluding chapter to this volume contains the draft of a proposed amendment which the author believes will incorporate these principles into the national labor code, and at the same time protect labor organizations from any possible misuse of the increased power delegated to the administrative agency concerned.

6. The Employer—The Walsh bill pointedly deletes the word "interference" from the presently prohibited "interference, restraint or coercion," and provides that even the remaining terms shall not prevent the employer from indulging in "any expressions of opinion with respect to any matter which may be of interest to employees or the general public, provided that such expressions of opinion are not accompanied by acts of discrimination or threats thereof." Advocacy of this vitiating amendment by the A. F. of L. can only be attributed to pique arising from a few cases in which employers have been ordered to desist from encouraging membership in A. F. of L. unions. It would open the door to widespread employer control over the union activities of employees, since "the courts would interpret the removal of the word 'interference' to sanction many forms of employer activity now proscribed by the Act."<sup>195</sup> The breach is

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<sup>194</sup> *Ibid.*, p. 980. Professor Jaffe, *op. cit.* at n. 168, arrives at a substantially similar conclusion.

<sup>195</sup> Report of the N. L. R. B., *ibid.*, p. 495. It should be noted, however, that this amendment is predicated upon a strict distinction between "company unions," which are defined in the Walsh bill as agencies "which the employer creates, dominates, controls, or maintains" and *bona fide* labor organizations. The A. F. of L. does not advocate softening the ban on company unions. *Ibid.*, p. 795.

widened even more by a further provision in the same bill which would prohibit only that discrimination between unions which *discouraged* membership in a union. President Green admitted that the employer might say to his workers, "we want you to join the A. F. of L. or the C. I. O.," without violating the new act,<sup>196</sup> but offers this justification:

The removal of the general term "interference" is to remove the discretion of the Board to invalidate our contracts, to enter cease-and-desist orders against recognition of existing bona fide labor unions, and to set aside elections by resorting to language which is intended to apply to company unions. We contend that Congress never intended otherwise and the fact that rival unionism exists does not alter the law. There was no dual unionism in existence at the time the Act was framed. Those activities of an employer in relation to a legitimate nationally affiliated labor organization which were lawful before dual unionism came into being are not unlawful since dual unionism has come into existence.<sup>197</sup>

In spite of this argument, it cannot be doubted that the deletion, while it might confer some transitory benefit upon the A. F. of L., would in the long run work against the best interests of the organized labor movement.

7. Miscellaneous—The Walsh bill contains a procedural modification whereby "certification or denial thereof, or dismissal of the request for certification within the time specified shall constitute a final order and shall be reviewable upon the petition of any labor organization aggrieved by such action." This would give to unions which had either lost or been denied elections the opportunity for appellate review. There can be no doubt that the superimposition of rival unionism upon a united labor movement bestowed upon certification an importance far beyond that originally contemplated. While there is a good deal of merit in the Board's argument that to permit appeal would hamper the speedy resolution of representation controversies,<sup>198</sup> there is also a seeming lack of equity in refusing review in so important a matter.<sup>199</sup>

The Burke bill would limit a labor dispute to a "controversy between an employer and his employees concerning terms, tenure, or

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<sup>196</sup> *Ibid.*, pp. 649-650.

<sup>197</sup> *Ibid.*, p. 785.

<sup>198</sup> *House Hearings*, pp. 624-625; *Senate Hearings*, pp. 460-463, 583-587.

<sup>199</sup> See the corroborative statement of Professor Paul F. Brissenden, *House Hearings*, p. 1592.

conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment." Rival union disputes would thus be excluded. While the definition is not of paramount importance so far as the Act itself is concerned, it would introduce a potentially dangerous guide for judicial and administrative agencies which look to Congress for leadership in matters of labor policy.<sup>200</sup>

Comment was evoked by the obstructionist strategy followed by some unions whereby they file "C" or unfair labor practice petitions to prevent the consummation of "R" or representation cases in which they fear defeat. This is made possible by the fact that the Board refrains from ordering elections until all charges of employer domination directed against any of the prospective contestants have been heard. Although this practice is not widespread,<sup>201</sup> both the Walsh and Burke bills contain provisions designed to speed the Board's operations. Since the Board has conducted its work as expeditiously as possible in view of the magnitude of its task and the limited funds at its disposal, there would be little gain in attempting to impose arbitrary and unworkable time schedules upon it.

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<sup>200</sup> See, *e. g.*, Fierst and Spector, "Unemployment Compensation in Labor Disputes," 49 *Yale Law Journal* 461, 473 (1940).

<sup>201</sup> Testimony of Charles Fahy, *Senate Hearings*, pp. 2844-2846.

## THE COURTS INTERPRET

### A. ANTI-INJUNCTION LEGISLATION

It has already been remarked that the crucial definition contained in the Norris-La Guardia Act is that of "labor dispute,"<sup>1</sup> inasmuch as the statute is inoperative unless a given controversy may thus be characterized.<sup>2</sup> The most common attack upon the application of the Act<sup>3</sup> to rival union disputes has centered upon the assertion that this category of labor controversy does not fall within the statutory definition. The problem may be condensed, then, to a discussion of the arguments on the accuracy of the following proposition: A rival union dispute<sup>4</sup> is technically a "labor dispute" within the meaning of the anti-injunction act.

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<sup>1</sup> *Supra*, p. 115. Justice Butler, dissenting in *Lauf v. Shinner*, 303 U. S. 323 (1938), agreed that "So far as concerns the question here involved, the phrase 'labor dispute' is the basic element of the Act."

<sup>2</sup> Constitutionality of the Federal Act, 47 Stat. 70, 29 U. S. Code, Secs. 101-115 (1932), was upheld by the Supreme Court in *Lauf v. Shinner*, 303 U. S. 323 (1938) and *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552 (1938). In the latter, Justice Roberts wrote: "There can be no question of the power of Congress to define and limit the jurisdiction of the inferior courts of the United States." As to the constitutional problems of the state legislation, see: Note, 24 *Illinois Bar Journal* 320 (1936); "Constitutionality of the State Statutes Limiting Injunctions in Labor Disputes," 46 *Yale Law Journal* 1064 (1937); "State Anti-Injunction Statutes," 35 *Michigan Law Review* 1320 (1937); "Recent Statutes Affecting Injunctions and Yellow-Dog Contracts," 30 *Illinois Law Review* 854 (1936).

<sup>3</sup> The term "act" or "anti-injunction act" as employed herein refers to state as well as federal legislation unless there are significant differences, in which case special notation will be made. The section number references pertain to the federal act.

<sup>4</sup> For the purposes of the immediate discussion, a rival union dispute will be deemed to embrace the following situations:

(1) where co-employees of an establishment are divided into two or more competing unions, each of which is actively seeking certain rights and privileges from the employer;

(2) where less than all the employees of an establishment are members of a union which, in seeking exclusive bargaining rights, is opposed either by (a) a non-union (i. e., not formally organized to the extent of having a society with by-laws, officers and other factors to regulate mutual relation-

On its face, Section 13 would seem to leave little alternative to an affirmation of the proposition.<sup>5</sup> For five years after the adoption of the Act, however, a vigorous school of thought, led by the United States Court of Appeals for the Seventh Circuit, maintained a negative position.<sup>6</sup> The leading case in support of this view, so widely celebrated as to merit more than cursory reference, involved a controversy occasioned by the secession of a group of miners in the Illinois coal fields from the United Mine Workers of America in 1932, and the formation of a rival, the Progressive Miners of America.<sup>7</sup> The latter demanded recognition as collective bargain-

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ships) but cohesive group of employees or (b) individual employees, provided that these individuals are not purely passive in their opposition;

(3) where a union none of whose members are employed in an establishment is demanding either that its members be employed or that the employed, unorganized workers be required to become members, provided that the latter have indicated their desire to remain outside the union;

(4) where labor unions organized on an industry wide basis are competing on a national scale; and

(5) any other combination whereby two or more organized groups of workers carry on active warfare over trade union prerogatives.

While all of the aforementioned circumstances do not constitute rival union disputes as the term is defined in Chapter I, the courts characteristically tend to make little distinction between them and apply the principles derived from any one group to the others. This grouping is desirable in order to eliminate the necessity for lengthy and repetitious narration of fact in connection with each case cited below.

It should also be noted that a dispute may be essentially a rival union dispute despite the fact that it is the employer who seeks injunctive relief. Conversely, the mere fact that a union is complainant against another union is no proof of the fact that the issue is primarily one of inter-union rivalry. The difficulty of determining from the names of ostensible plaintiffs and defendants whether there is actual rivalry among employees or whether the employer is using a fearful group of employees to subdue a threatened organizational campaign is enhanced by the fact that very often employer and employees appear as co-plaintiffs against a rival group of employees.

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<sup>5</sup> "The further proviso that a case shall be held to involve a labor dispute whether it lie between employer and employee or 'between one or more employees or associations of employees' . . . seems to have been inserted for the specific purpose of including within the protection of the Act a dispute for recognition between two unions in the same trade or industry." Comment, 45 *Yale Law Journal* 1320 (1936).

<sup>6</sup> The Court of Appeals for the Seventh Circuit has since reversed its stand in *Blankenship v. Kurfman*, 96 Fed. (2d) 450 (1938).

<sup>7</sup> *United Electric Coal Co. v. Rice*, 9 F. Supp. 635, *rev'd*, 80 Fed (2d) 1, *cert. den.* 297 U. S. 714 (1935). For further facts, see *People v. Beacham*, 358 Ill. 373, 193 N. E. 205 (1934); *Low v. Harris*, 90 Fed. (2d) 783 (1937); *United States v. Anderson*, C. C. H. par. 18,294 (C. C. A.

ing representative of its members, and began a campaign against the operators, deeply tinged with violence, to force acquiescence. Simultaneously, it unsuccessfully sought to attain the same objective by legal action.<sup>8</sup> The United Electric Coal Co., which had entered into a collective agreement with the United Mine Workers, entered suit to restrain the Progressive Union from interfering with the operation of its properties. Relief was denied by the district court, but the Circuit Court of Appeals agreed to the restraint, holding: "Where the difference is between two unions, each striving to contract with the employer, we are unable to see where any labor dispute exists to which the employer is a party." The Supreme Court refused to review the proceedings. Similar decisions were rendered by the circuit court in two other rival union cases,<sup>9</sup> and the same general stand taken by a number of federal district and state courts.<sup>10</sup>

1. The chief argument in support of this position is that the opposite contention involves a contradiction between Sections 2 and 13 of the Act. The dissenting opinion of Justice Butler (Justice McReynolds concurring) in *Lauf v. Shinner*<sup>11</sup> makes this clear:

The decision just announced ignores the declared policy of Congress that the worker should be free to decline association with his fellows, that he should have full freedom in that respect and in the designation of representatives, and especially that he should be free from interference, restraint, or

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1939). For comment, see 36 *Columbia Law Review* 157 (1936); 35 *Michigan Law Review* 1320 (1937); 2 *Missouri Law Review* 1 (1937); 50 *Harvard Law Review* 1295 (1937); 45 *Yale Law Journal* 1320 (1936); 4 *I. J. A. Bull.* No. 10 (1936).

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<sup>8</sup> *Stanley v. Peabody Coal Co.*, 5 F. Supp. 612 (1934); *Progressive Miners v. Peabody Coal Co.*, 7 F. Supp. 340 (1934); *Western Powder Mfg. Co. v. Interstate Coal Co.*, 5 F. Supp. 619 (1934).

<sup>9</sup> *Lauf v. Shinner*, 82 Fed. (2d) 68, 90 Fed. (2d) 250, *rev'd*. 303 U. S. 323 (1938); *Scavenger Service Corp. v. Courtney*, 85 Fed. (2d) 825 (1936).

<sup>10</sup> *International Union of Brewery Workers v. California State Brewers' Institute*, 25 F. Supp. 870 (1938); *Donnelly Garment Co. v. International Ladies' Garment Workers' Union*, 20 F. Supp. 767, 21 F. Supp. 807, decree vacated and remanded, 304 U. S. 243 (1938); *Waterfront Employers of Portland v. C. I. O., C. C. H.* par. 18,097 (U. S. Dist. Ct. Ore. 1938); *Oberman & Co. v. United Garment Workers*, 21 F. Supp. 20 (1937); *Samuel Hertzog Corp. v. Gibbs*, 3 N. E. (2d) 831 (Mass. 1936); *Safeway Stores Inc. v. Retail Clerks Union*, 184 Wash. 322, 51 Pac. (2d) 372 (1935); *Fornili v. Auto Mechanics Union*, C. C. H. par. 18,456 (Wash. 1939); *May's Furs v. Doe*, N. Y. L. J. May 11, 1937, p. 2369, *aff'd*. 255 A. D. 643, 8 N. Y. S. (2d) 819 (1939); *Trommers Inc. v. Brotherhood of Brewery Workers*, 167 Misc. 197, 3 N. Y. S. (2d) 782 (1938).

<sup>11</sup> 303 U. S. 323 (1938).

coercion of employers. [Section 2] To say that a "labor dispute" [Section 13] is created by the mere refusal of respondent to comply with the demand that it compel its employees to designate the union as their representative unmistakably subverts this policy and consequently puts a construction upon the words contrary to the manifest congressional intent . . . . Since the whole aim of the injury here inflicted and threatened to be inflicted by the union was to compel respondent to influence and coerce its employees in the designation of their representatives, the acts of the union were in plain defiance of the declared policy of Congress, and find no support in its substantive provisions . . . .

Clearly the union could not be authorized by statute to resort to coercive measures *directly* against the employees to compel submission to its wishes, for that would be to give one group of workmen autocratic power of control in respect of the liberties of another group, in contravention of the Fifth Amendment as well as of the policy of Congress expressly declared in this Act. And that being true, the attempt to coerce submission through constrained interference of the employer was equally unlawful.<sup>12</sup>

A variant of this same view recognizes the privilege of a union to intrude itself into an *unorganized* establishment,<sup>13</sup> but considers this privilege abrogated by the declaration of policy contained in the Act in the presence of an *organized* rival group of workers.<sup>14</sup>

2. A second approach denies the possibility of a labor dispute where the so-called dispute is unilateral.<sup>15</sup> If, for example, an employer has amicably contracted with his employees, the intruding rival union would be considered essentially a stranger to the transaction, and neither the employer nor the contracting organization is under any obligation to treat with it.<sup>16</sup> Added force is lent by the

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<sup>12</sup> Substantially similar argumentation may be found in *Donnelly Garment Co. v. I. L. G. W. U.*, 21 F. Supp. 807 (1937). See also *American Furniture Co. v. I. B. of T. C. & H.*, 222 Wis. 338, 268 N. W. 250 (1936), dissent of Justice Fowler; *Hedges-Walsh-Weidner Co. v. Duffy*, C. C. H. par. 16,066 (U. S. D. C. 1934); Note, 24 *Virginia Law Quarterly* 684 (1938); Note, 16 *North Carolina Law Review* 411 (1938). Cf., Comment at 36 *Michigan Law Review* 1146 (1938).

<sup>13</sup> "In the absence of a factory labor organization, the defendants, though not sustaining the relationship of employees to plaintiff, nevertheless would have had the right to insist upon projecting their union into the plant of the plaintiff." Concurring opinion of Reeves, J., in *Donnelly Garment Co. v. I. L. G. W. U.*, 21 F. Supp. 807 (1937).

<sup>14</sup> *Ibid.*: "This right, however, was limited and liable to be counteracted and even destroyed, when the Congress provided for self organization among employees of individual factories. When so organized, the reason for the right in defendants no longer existed."

<sup>15</sup> *Lauf v. Shinner*, 82 Fed. (2d) 68 (1937), *rev'd*. 303 U. S. 323 (1938).

<sup>16</sup> Justice Butler thought that the demands of the third party no more constitute a labor controversy than "the highwayman's demand for the money of his victim and the latter's refusal to stand and deliver constitute a finan-

fact that compliance with the demands of the invader under such circumstances is legally impossible.<sup>17</sup> Furthermore, those who argue in this fashion maintain that in order to instill meaning into Section 8 of the Act, denying injunctive relief to one "who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration," there must be differences susceptible to mediation or arbitration.<sup>18</sup>

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cial controversy." Dissent, *Lauf v. Shinner*, 303 U. S. 323 (1938). Also, *United Electric Coal Co. v. Rice*, 80 Fed. (2d) 1 (1935); *International Union of Brewery Workers v. California State Brewers' Institute*, 25 F. Supp. 870 (1938); *Bond Stores v. Turner*, C. C. H. par. 18,461 (N. Y. A. D. 1939). Cf., *Cole v. Atlanta Terminal Co.*, 15 F. Supp. 131 (1936).

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<sup>17</sup> Judge Otis, in an admirable dissent in the case of the *Donnelly Garment Co. v. I. L. G. W. U.*, 21 F. Supp. 807 (1937), to which the author acknowledges his indebtedness for many of the arguments presented in this chapter, sums up the logic of this reasoning as follows: "The further conclusion that either the definition of a labor dispute should be restricted to a dispute in which each of the disputants, e. g., the labor union, is demanding from the other something that it has a right to demand and that the other has a right to grant, or that the prohibition against the issuance of an injunction except as conditioned by the act is impliedly modified so as to authorize an injunction without compliance with the conditions of the act in a case in which the demand made by a labor union is a demand it does not have a right to make or one which the employer cannot lawfully grant is to be considered . . . . Is it to be understood then that . . . the Norris-La Guardia Act is to be read as if Section 1 of the Act . . . were thus written [quotes section 1 and adds]: 'Provided, however, that the prohibitions of this section shall not apply in a case in which employees, or an association of employees, are demanding of an employer what they do not have a legal right to demand or what he does not have a legal right to grant. Or is it to be understood that the section, section 13 . . . is to be read as if it was written as follows: [quotes section 13 (c) and adds] 'Provided, however, that if the controversy is one in which employees, or an association of employees demands of an employer what it does not have a legal right to demand or what the employer does not have a legal right to grant, the controversy shall not be a labor dispute'?" See also *American Furniture Co. v. I. B. of T. C. & H.*, 222 Wis. 338, 268 N. W. 256 (1936); *American Gas Stations v. Doe*, 250 A. D. 227, 293 N. Y. S. 1019 (1937); *Mays' Furs v. Doe*, N. Y. L. J., May 11, 1937, p. 2369, *aff'd*, 8 N. Y. S. (2d) 819, 255 A. D. 643 (1939); *Stalban v. Freedman*, 11 N. Y. S. (2d) 343 (1939).

<sup>18</sup> "The plaintiff has nothing to mediate with the unions. To compel it to do what section 876-a, C. P. A., requires to be done as conditions precedent to obtaining a temporary injunction would be fatuous. Quite obviously, that section is no pattern for the facts here disclosed." *Weil & Co. v. Doe*, 5 N. Y. S. (2d) 559, 168 Misc. 211 (1938).

Similar reasoning seems to have been used in the recent case of *Obergfell v. Green*, 29 F. Supp. 589 (1939), involving the Teamsters-Brewers dispute. For critical comment, see "Judicial Intercession in Internal Affairs of the

3. A third line of reasoning, stemming back to the restrictive dictum of Justice Parker in the *Red Jacket* case,<sup>19</sup> arrives at the conclusion that "the dispute referred to in the statute must be one between the employer and the employee or growing directly out of their relationship."<sup>20</sup> For, "... although in section 113 a 'labor dispute' is defined as including controversies in which the disputants may not stand in the proximate relation of employer and employee, nevertheless the relationship of employer and employee is of the essence of the purpose and policy declared."<sup>21</sup> It follows that no statutory labor dispute can be maintained unless the status of employer-employee, or employee-employee, logically, has been attained antecedently.<sup>22</sup> This particular approach is available only when none of the members of the striking or picketing union has been previously employed at the complaining establishment.

As a corollary, some courts have insisted that the employer, caught in the cross-fire of competing unions, is a mere bystander for the purpose of that dispute, and should therefore be free from the inhibitions of the statute.

Notwithstanding the broad terms of the Norris-La Guardia Act, the intention can not have been to prevent a member of the general public from obtaining proper relief when sustaining irreparable damage because a dispute to which he was not a party existed between unions.<sup>23</sup>

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American Federation of Labor," 49 *Yale Law Journal* 329 (1939); Louis L. Jaffe, "Inter-Union Disputes in Search of a Forum," 49 *Yale Law Journal* 424 (1940).

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<sup>19</sup> *United Mine Workers v. Red Jacket Consolidated Coal and Coke*, 18 Fed. (2d) 839 (1927).

<sup>20</sup> *United Electric Coal Co. v. Rice*, 80 Fed. (2d) 1 (1935).

<sup>21</sup> *Donnelly Garment Co. v. I. L. G. W. U.*, 21 F. Supp. 807 (1937).

<sup>22</sup> "There being an utter lack of connection between the petitioners and respondent or its employees, the union was an intruder into the affairs of the employer and its employees . . . . Their purpose was not unionization of respondent's employees, for they already belonged to a labor organization of their own choosing. The purpose was to coerce the employees to join a particular organization which they had already repudiated. There is nothing in the state or federal statutes that purports to give labor unions or individuals so contriving the status of party to a 'labor dispute'." *Lauf v. Shinner*, 303 U. S. 323 (1938), dissent of Justice Butler. Accord: *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552 (1938), dissent of Justices Butler and McReynolds; *May's Furs v. Bauer*, N. Y. L. J., May 11, 1937, p. 2369; Editorial Comments, N. Y. L. J., Dec. 10, 1938, p. 2086.

<sup>23</sup> *M. & M. Woodworking Co. v. Plywood & Veneer Workers Union*, 23 F. Supp. 11 (1938). *Waterfront Employers of Portland v. C. I. O.*, C. C. H. par. 18,096 (U. S. D. C. 1938); *in re. Cleveland and Sandusky Brewing Co.*, 11 F. Supp. 198 (1935).

It [the statute] does not apply to disputes between employees or to disputes between employee unions to which employer is not a real party. The employer is not precluded from invoking the jurisdiction of a Federal court of equity unless it appears that it was in some way a party to the dispute between two unions . . . .<sup>24</sup>

The courts of New York have adopted the further refinement that there can be no "labor dispute" between a union and an entrepreneur who employs no labor, despite the broad scope of the definition.<sup>25</sup> While this would seldom be of importance as far as rival unionism is concerned, it might prove significant when labor organizations were attempting to stabilize wages and working conditions within an industry by means of a general agreement with regard to prices.<sup>26</sup>

4. A fourth attack upon the scope of Section 13 is predicated upon subdivision (c) of that very section, whereby "any controversy concerning terms or conditions of employment, or concerning the

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<sup>24</sup> *United Electric Coal Co. v. Rice*, 80 Fed. (2d) 1 (1935). Also, *John F. Trommers v. Brotherhood of Brewery Workers*, 3 N. Y. S. (2d) 782, 167 Misc. 197 (1938); *Retail Food Clerks Union v. Union Premier Food Stores*, 98 Fed. (2d) 821, 101 Fed. (2d) 475 (1938).

<sup>25</sup> *Bieber v. Bininbaum*, 168 Misc. 943, 6 N. Y. S. (2d) 63 (1938); *Boro Park Sanitary Live Poultry Market v. Heller*, N. Y. L. J., Jan. 1, 1939, p. 962, reversed, 256 A. D. 588, 11 N. Y. S. (2d) 164, *aff'd*, 280 N. Y. 481, 21 N. E. (2d) 637 (1939); *Fish v. Friedman*, N. Y. L. J., July 24, 1939, p. 192; *Gips v. Osman*, 9 N. Y. S. (2d) 828, 170 Misc. 53 (1939); *Miller v. Fish Workers Union*, 11 N. Y. S. (2d) 278, 170 Misc. 713 (1939); *Schlossberg v. Winokur*, 4 Labor Relations Reporter 626 (1939); *Simon v. Boris*, N. Y. L. J., Jan. 24, 1939, p. 364; *Thompson v. Boekhut*, 249 A. D. 77, *aff'd*, 273 N. Y. 390 (1937); *Wishny v. Jones*, 169 Misc. 459, 8 N. Y. S. (2d) 2 (1938); *Wohl v. Bakery Drivers Union*, Bronx County Clerk Index 273 (1939); *Zawin v. Doe*, N. Y. L. J., June 26, 1939, p. 2948; *Botnick v. Winokur*, 7 N. Y. S. (2d) 6 (1938); *Pitter v. Kaminsky*, 7 N. Y. S. (2d) 10 (1938); *Kirshner v. Heller*, 14 N. Y. S. (2d) 595 (1939); *Marvin v. Frisch*, N. Y. L. J., Oct. 6, 1939, p. 1001; *Baillis v. Fuchs*, N. Y. L. J., Dec. 27, 1939, p. 2325; *Kraushaar v. Krug*, 5 Labor Relations Reporter 442 (1939).

However, a labor dispute has been held to exist where the employer had previous contractual relationships with the defendant union or belonged to an employer's association which did: *Eidinger v. Winokur*, Kings County Clerk Index 17858 (1938); *Ridge Stores, Inc. v. Janow*, Kings County Clerk Index 4084 (1938); *Schwartz v. Fish Workers Union*, 170 Misc. 566 (1939); *Silver v. Vogel*, Bronx County Clerk Index 3095 (1939); *Tepper v. Doe*, Kings County Clerk Index 11109 (1935); *Wachman v. Winokur*, N. Y. L. J., June 29, 1939, p. 3008; *Zeiler v. Doe*, N. Y. L. J., June 26, 1939, p. 2954.

<sup>26</sup> This is ably discussed by Justice Sheintag in *Abeles v. Friedman*, 171 Misc. 1042, 14 N. Y. S. (2d) 252 (1939).

association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment" is defined as a labor dispute. Narrow constructionists declare that the heart of a dispute must revolve about the subject matter delineated in this section, for "a controversy concerning matters which do not involve that element cannot possibly be a 'labor dispute'."<sup>27</sup>

5. A New York court based its finding of no "labor dispute" upon the fact that the picketing union had been denied incorporation and a certificate of authority to do business in New York State because the similarity of its name, the National Federation of Labor, to the American Federation of Labor would tend to confuse the public. "The definition in the Civil Practice Act of a labor dispute as one involving an association of employees presupposes the existence of an association lawfully transacting business in this State. Defendant union, being an association of employees doing or attempting to do business in this State unlawfully, is not covered by the definition given in Section 876(a)."<sup>28</sup> A similar decision was rendered by another New York Supreme Court Justice, who held that no statutory "labor dispute" existed when a "so-called" union picketed an employer to secure the employment of its members, rather than those of a rival, on terms and conditions of employment that compared unfavorably with those obtaining under the rival's contract.<sup>29</sup>

However, the great weight of authority<sup>30</sup> leans toward affirmation of the basic proposition as stated above. The Supreme Court of the

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<sup>27</sup> *Donnelly Garment Co. v. I. L. G. W. U.*, 20 F. Supp. 767 (1937). Accord: *Converse v. Highway Construction Co.*, 107 Fed. (2d) 127 (1939); *New Negro Alliance v. Kaufman*, 64 App. D. C. 362, 78 Fed. (2d) 415 (1936), concurring opinion of Judge Groner; *Waterfront Employers of Portland v. C. I. O.*, C. C. H. par. 18,096 (U. S. D. C. 1938); *Fehr Baking Co. v. Bakers Union*, 20 F. Supp. 691 (1937); *Dorrington v. Manning*, 4 Atl. (2d) 886 (Pa. 1939); *Beck Shoe Corp. v. Johnson*, 153 Misc. 363, 274 N. Y. S. 946 (1934); *La Rose v. Possehl*, 156 Misc. 476, 282 N. Y. S. 332 (1935); *Trommers, Inc. v. Brotherhood of Brewery Workers*, 167 Misc. 197, 3 N. Y. S. (2d) 782 (1938).

<sup>28</sup> *Hoffman's Vegetarian Restaurant v. Lee*, 170 Misc. 815, 10 N. Y. S. (2d) 287 (1939).

<sup>29</sup> *Spinner v. Paolillo*, N. Y. L. J., May 26, 1939, p. 2442.

<sup>30</sup> *Blankenship v. Kurfman*, 96 Fed. (2d) 450 (1938); *Levering & Garrigues v. Morrin*, 71 Fed. (2d) 284 (1934); *International Brotherhood of*

United States, in three decisions,<sup>31</sup> has greatly expanded the previous concept of a statutory labor dispute, although it has not yet ruled directly on the status of a rival union dispute.<sup>32</sup> Refutations of the opposing arguments, in the same order as advanced above, have been suggested as follows:

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Teamsters v. Brewery Workers Union, 106 Fed. (2d) 871 (1939); Cinderella Theatre Co. v. Sign Writers Local Union, 6 F. Supp. 164 (1934); Cole v. Atlanta Terminal Co., 15 F. Supp. 131 (1936); Cupples Co. v. A. F. of L., 20 F. Supp. 894 (1937); Dean v. Mayo, 8 F. Supp. 73 (1934); Fur Workers Union v. Fur Workers Union, 105 Fed. (2d) 1, *aff'd*. 60 S. Ct. 292 (1939); Grace Co. v. Williams, 20 F. Supp. 263, *aff'd*. 96 Fed. (2d) 478 (1937); Houston & North Texas Motor Freight Lines v. International Brotherhood of Teamsters, 24 F. Supp. 619 (1938); La Clede Steel Co. v. Newton, 6 F. Supp. 625, *aff'd*. and *mod.* 80 Fed. (2d) 636 (1935); Miller Parlor Furniture Co. v. Furniture Workers Industrial Union, 8 F. Supp. 209 (1934); M. & M. Woodworking Co. v. Plywood & Veneer Workers Union, 23 F. Supp. 11 (1938); Sharp & Dohme, Inc. v. Storage Warehouse Employees Union, 24 F. Supp. 701 (1938); United Electric Coal Co. v. Rice, 9 F. Supp. 635 (1934); United States v. Weirton Steel Co., 7 F. Supp. 255 (1934); Washington Shoe Workers Union v. United Shoe Workers, C. C. H. par 18,046 (U. S. D. C. 1937); American Furniture Co. v. I. B. of T. C. & H., 222 Wis. 338, 268 N. W. 250 (1936); Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 63 Pac. (2d) 397 (1936); George B. Wallace Co. v. International Association of Machinists, 63 Pac. (2d) 1090 (Ore. 1936); Senn v. Tile Layers Protective Union, 268 N. W. 270, 222 Wis. 383 (1936); Bacinski v. Douglas, N. Y. L. J., Nov. 30, 1937; Crawford Clothes v. Frankel, N. Y. County Clerk Index 19663 (1937); Gorner v. Douglas, N. Y. L. J., Aug. 14, 1937, p. 401; International Brotherhood of Building Trade Unions v. Doe, Kings County Clerk Index 5298 (1938); Miele v. Sheet Metal Workers Union, Sup. Ct., Queens, June 8, 1937; Purity Restaurant, Inc. v. Doe, Kings County Clerk Index 6126 (1939); Times Square Concessions v. Meyer, N. Y. County Clerk Index 31075 (1938); Fairfield Bar and Restaurant v. Friedman, 172 Misc. 146, 14 N. Y. S. (2d) 709 (1939).

See also 5 *University of Chicago Law Review* 514 (1938); 11 *Southern California Law Review* 484 (1938); 36 *Michigan Law Review* 1146 (1938); 120 *American Law Reports* 316 (1938); Herbert A. Lien, *Labor Law and Labor Relations* (New York, 1938), p. 633.

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<sup>31</sup> Lauf v. Shinner, 303 U. S. 323 (1938); New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552 (1938); Senn v. Tile Layers Protective Association, 301 U. S. 468 (1937).

<sup>32</sup> Opportunity for a discussion of the subject was afforded in the Lauf case, where the Circuit Court of Appeals found that employees who had refused to join the picketing union had "organized their own union and . . . selected their own representative without interference or participation of their employer." Lauf v. Shinner, 82 Fed. (2d) 68 (1938). In the prevailing Supreme Court opinion, however, no mention was made of this fact, so that it probably must be treated as a one-union case. Still later, the Supreme Court affirmed without opinion the rival union case of Fur Workers Union v. Fur Workers Union, 105 Fed. (2d) 1, 60 S. Ct. 292

1. The contention that workers are coerced in violation of Section 2 of the Act:

It has been argued that the "public policy of the United States, as declared by Congress, is against interference with workingmen by employers of labor only. It does not seem to me the court may first expand the declared public policy and then upon the expanded declaration build a limitation of an otherwise unlimited definition."<sup>33</sup> This, however, constitutes an insufficient answer to the charge that coercion is used against an employer in an effort to induce him to interfere with his employees' statutory rights. The Supreme Court of the United States has offered a more general response, holding:

We find nothing in the declaration of policy which narrows the definition of a labor dispute as found in the statutes. The rights of the parties and the jurisdiction of the federal courts are to be determined according to the express provisions applicable to labor disputes as so defined.<sup>34</sup>

2. The allegation that a rival union dispute is unilateral, the employer not being a party to it:

In rebuttal, the contention is advanced that "The existence or non-existence of a dispute does not depend upon where the merits lie nor upon the inability, for legal or other reasons, of one of the parties to comply with the demands of the other."<sup>35</sup> The bare demand to negotiate made upon an employer by a union within the same industry is considered, *ipso facto*, to create an arguable issue.<sup>36</sup>

3. The contention that there must be an immediate and direct employer-employee relationship:

It seems clearly to have been Congressional intent that "the concept that a labor dispute must be between employer and employees

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(1939). The general tone of the decisions cited immediately above, however, was so unmistakable as to bring even the recalcitrant Seventh Circuit into line. See *Blankenship v. Kurfman*, 96 Fed. (2d) 450 (1938).

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<sup>33</sup> *Donnelly Garment Co. v. I. L. G. W. U.*, 21 F. Supp. 807 (1937), dissent of Judge Otis.

<sup>34</sup> *Lauf v. Shinner*, 303 U. S. 323 (1938). Also, *Bergman v. Levenson*, N. Y. L. J., April 28, 1939, p. 1955; May 20, 1939, P. 2334.

<sup>35</sup> *Donnelly Garment Co. v. I. L. G. W. U.*, 21 F. Supp. 807 (1937), dissent of Judge Otis.

<sup>36</sup> *Dean v. Mayo*, 8 F. Supp. 73 (1934); *Miller Parlor Furniture Co. v. Furniture Workers Union*, 8 F. Supp. 209 (1934); *Sharp and Dohme Inc. v. Storage Warehouse Employees Union*, 24 F. Supp. 701 (1938); *Senn v. Tile Layers Protective Union*, 268 N. W. 270, 222 Wis. 383 (1936).

was to be removed completely from the definition of a labor dispute."<sup>37</sup> The *Sanitary Grocery* case,<sup>38</sup> in which picketing by a negro civic organization against an establishment which allegedly refused to employ negroes was held to be in pursuance of a labor dispute, constitutes authoritative determination of the non-necessity for a precedent employer-employee relationship.<sup>39</sup> Section 13(b) of the Act provides that a union "shall be held to be a person participating or interested in a labor dispute if relief is sought against . . . it, and if . . . it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein"—seemingly a severe stricture on the imposition of any employment status prerequisite. Nor may an employer plead that irrespective of the finding of a labor dispute in a rival union controversy, he may properly secure injunctive relief without meeting the statutory requirements, for Section 1 imposes restrictions in any case "involving or growing out of a labor dispute,"<sup>40</sup> without specification of parties.

4. The contention that the dispute must involve the subject matter of Section 13(c):

The validity of the fourth issue hinges upon the questionable assumption that Section 13 may not be read disjunctively. This interpretation has the effect of limiting the entire section to the scope of one of its subdivisions, i. e., subdivision (c), and adding the con-

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<sup>37</sup> *Donnelly Garment Co. v. I. L. G. W. U.*, 21 F. Supp. 807 (1937), dissent of Judge Otis.

<sup>38</sup> *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552 (1938). Cf. *Aurora Amusement Corp. v. Doe*, N. Y. L. J., Mar. 31, 1939, p. 1481; *Stevens v. West Philadelphia Youth Civic League*, 3 Labor Relations Reporter 691 (Pa. 1939).

<sup>39</sup> *Blankenship v. Kurfman*, 96 Fed. (2d) 450 (1938); *Houston & North Texas Motor Freight Lines v. International Brotherhood of Teamsters*, 24 F. Supp. 619 (1938); *L. L. Coryell & Sons v. Petroleum Workers Union*, 19 F. Supp. 749 (1937); *George B. Wallace Co. v. International Association of Machinists*, 63 Pac. (2d) 1090 (Ore. 1936); *Goldfinger v. Feintuch*, 276 N. Y. 281, 11 N. E. (2d) 910 (1938); *Atlantic Refining Co. v. Cohen*, C. C. H. par. 18,253 (Pa. 1938).

<sup>40</sup> There must be some limit, however, to the periphery of a "labor dispute," and there will probably be a tendency to relieve parties standing in tenuous relationship to the immediate disputants of the statutory burdens. See, for example, *Waterfront Employers of Portland v. C. I. O.*, C. C. H. par. 18,096 (U. S. D. C. 1938); *Goldfinger v. Feintuch*, 276 N. Y. 281, 11 N. E. (2d) 910 (1938); "Secondary Boycott in Labor Disputes," 47 *Yale Law Journal* 341 (1937).

junction "and" at the beginning of subdivisions (b) and (c). While it may be conceded that the transition from persons involved in a controversy [Section 13(a)] to terms of a controversy [Section 13(c)] is a discrete one, canons of plausible construction dictate the rejection of a theory whereby subdivision (a) is rendered redundant, and the adoption of the view that the definitions are complementary but not necessarily interdependent.

Even meeting the conjunctive constructionists on their own ground, however, it is possible to assert that the question of which union is to represent the employees concerns "representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment," inasmuch as acceptance of a particular set of representatives by the employer may be said to constitute a condition of employment.<sup>41</sup>

5. The requirement that the picketing union, to instigate a "labor dispute," must be *bona fide*:

It is easy to see into what difficulties the extension of this doctrine might lead. The determination of what is and what is not a *bona fide* union is a matter on which experts may differ. To permit judges to discriminate in this manner is to invite the withdrawal of the protection afforded by the statute from labor organizations which do not receive judicial sanction. Undoubtedly, there are instances where equity would demand that organizations be prohibited from causing trouble, notably where the defendants were clearly racketeering outfits. But basing the test of a "labor dispute" upon the wages and conditions demanded by a picketing union, as compared with those enjoyed by the members of a rival organization presently employed, or upon the affiliation or lack of affiliation of the pickets, constitutes an unwarranted restriction of the legislative intent, and may serve to limit legitimate union activities unduly.

Courts adhering to the affirmative of the proposition content themselves, on the whole, with unembellished holdings to the effect that the facts as set forth constitute labor disputes, for, in the words of Judge Otis, "What is as obvious as the sun at noonday shining in an unclouded sky ought not to require further demonstration than

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<sup>41</sup> *Donnelly Garment Co. v. I. L. G. W. U.*, 23 F. Supp. 998 (1938).

to say, 'there it is'."<sup>42</sup> Without attempting to probe the philosophical implications of the learned jurist's dictum, it may fairly be concluded that the courts generally would concur in that employment of it which would result in the inclusion of rival union disputes, as hereinbefore defined, within the statutory concept of a "labor dispute."<sup>43</sup>

<sup>42</sup> *Donnelly Garment Co. v. I. L. G. W. U.*, 21 F. Supp. 807 (1937), dissent of Judge Otis.

<sup>43</sup> For additional restrictive interpretations of the term "labor dispute," see the following cases: *Adams v. Building Service Employees Union*, 84 Pac. (2d) 1021 (Wash. 1938); *Fehr Baking Co. v. Bakers Union*, 20 F. Supp. 691 (1937); *Meadowmoor Dairies v. Milk Wagon Drivers Union*, 21 N. E. (2d) 308 (Ill. 1939); *Jaffe v. Auto Mechanics Union*, C. C. H. par. 18,413 (Ill. App. 1939); *Maywood Farms v. Milk Wagon Drivers Union*, C. C. H. par. 18,453 (Ill. App. 1939); *Hendrickson Motor Truck Co. v. I. A. M.*, C. C. H. par. 18,454 (Ill. App. 1939); *Safeway Stores v. Retail Clerks Union*, 184 Wash. 322, 51 Pac. (2d) 372 (1935); *Muncie Building Trades Council v. Umbarger*, 17 N. E. (2d) 828 (Ind. 1938); *Perry Truck Lines v. I. B. of T.*, C. C. H. par. 18,442 (Col. Dist. Ct. 1939); *State v. Cooper*, C. C. H. par. 18,374 (Minn. 1939); *Alliance Auto Service v. Cohen*, 4 Labor Relations Reporter 659 (Pa. Com. Pleas. 1939); *Joerger v. Pittsburgh Musical Society*, 4 Labor Relations Reporter 110 (Pa. Com. Pleas. 1939); *American Gas Stations v. Doe*, 250 A. D. 227, 293 N. Y. S. 1019 (1937); *Associated Flour Haulers and Warehousemen, Inc. v. Sullivan*, 5 N. Y. S. (2d) 982, 168 Misc. 315 (1938); *Bard & Margolis v. Marcus*, N. Y. L. J., Dec. 2, 1938, p. 1924; Dec. 3, 1938, p. 1947; *Capitol Amusement Co. v. I. B. E. W.*, N. Y. L. J., June 3, 1939, p. 2561; *Frankel v. Bershod*, N. Y. County Clerk Index 18,756 (1936); *Gertz, Inc. v. Randau*, 162 Misc. 786, 295 N. Y. S. 871 (1937); *Harrington v. Ferris*, N. Y. County Clerk Index 26,804 (1938); *Jewish Hospital of Brooklyn v. Doe*, 300 N. Y. S. 1111 (1937); *Joseph Victori & Co. v. Palmer*, N. Y. L. J., Jan. 21, 1939, p. 324; *J. Sherman Furs, Inc. v. Potash*, N. Y. County Clerk Index 7921 (1939); *La Rose v. Possehl*, 156 Misc. 476, 282 N. Y. S. 332 (1935); *Lerner Shops v. Hamid*, N. Y. L. J., June 26, 1935, p. 3293; *Long Island Drug Co. v. Devery*, 6 N. Y. S. (2d) 390 (1938); *Medowar v. Eastmond*, N. Y. L. J., Sept. 6, 1939, p. 549; *Mlle. Reif v. Randau*, N. Y. L. J., Dec. 4, 1937, p. 1994; *Moneo v. Palmer*, N. Y. L. J., Dec. 20, 1938; *Opera-On-Tour, Inc. v. Weber*, 170 Misc. 272, 10 N. Y. S. (2d) 83 (1939); *Rand Tea & Coffee Stores v. Manganero*, N. Y. L. J., Jan. 5, 1938, p. 53; *Silverglate v. Kirkman*, N. Y. L. J., April 29, 1939, p. 1976; *Staats Herold v. White*, N. Y. L. J., Jan. 24, 1938, p. 378; *Weil & Co. v. Doe*, 168 Misc. 211, 5 N. Y. S. (2d) 559 (1938); *Wheeler Shipyards v. Green*, Kings County Clerk Index 10814 (1937); *Gugliotta v. East N. Y. Master Bakers Association*, N. Y. L. J., Oct. 3, 1939, p. 943; *McCarthy v. Brotherhood of Painters*, N. Y. L. J., Aug. 17, 1939, p. 393; *Uneeda Credit Clothing Stores v. Briskin*, 14 N. Y. S. (2d) 964 (1939).

For additional expansive interpretations of the term "labor dispute," see the following cases: *Kresge v. Amsler*, 99 Fed. (2d) 503, *cert. den.* 59 S. Ct. 582 (1938); *Levering and Garrigues v. Morrin*, 71 Fed. (2d) 284, *cert. den.* 293 U. S. 595 (1934); *Wilson & Co. v. Birl*, 27 F. Supp. 915, *aff'd.*, 105 Fed. (2d) 948 (1939); *Dean v. Mayo*, 8 F. Supp. 73, 9 F. Supp. 459

If the anti-injunction statutes are held inapplicable to rival union disputes, the common law principles outlined in Chapter V continue to govern. If, however, the equity jurisdiction of the courts is limited in such disputes, the statutory rules governing union activities supplant the common law. In view of the conclusion reached here as to the coverage of the statutes, a review of the newly imposed restrictions is necessary.

The anti-injunction acts, subject to the exceptions and variations noted,<sup>44</sup> expressly prohibit the courts, in the presence of a "labor

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(1934); *Lichterman v. Laundry Workers Union*, 282 N. W. 689, 283 N. W. 752 (Minn. 1938); *Goldfinger v. Feintuch*, 276 N. Y. 281, 11 N. E. (2d) 910, *modifying* 250 A. D. 751, 295 N. Y. S. 753, *reversing* 159 Misc. 806, 288 N. Y. S. 855; *Aberdeen Restaurant Corp. v. Gottfried*, 158 Misc. 787, 285 N. Y. S. 832 (1935); *Ansley Radio Corp. v. Carey*, N. Y. L. J., July 22, 1937; *Baillis v. Doe*, 4 Labor Relations Reporter 210 (N. Y. Sup. 1939); *Bent Steel Sections v. Doe*, 170 Misc. 736, 10 N. Y. S. (2d) 920 (1939); *Borgers v. Hotel & Restaurant Union*, Kings County Clerk Index 18026 (1935); *Burman v. Kirkman*, N. Y. County Clerk Index 2,439 (1939); *Clinchy v. Bakery & Confectionery Workers Union*, 94 N. Y. Law Journal 688 (1935); *Connors v. A. D. Juillard Co.*, C. C. H. par. 18,383 (N. Y. Sup. 1939); *Cost Curtis Corp. v. Doe*, Kings County Clerk Index 16,821 (1935); *Davis v. McGuigan*, C. C. H. par. 18,356 (Pa. Com. Pleas. 1939); *Emerson Radio & Phonograph Co. v. Doe*, N. Y. County Clerk Index 8,157 (1939); *Feinzig v. Suspender Makers Union*, N. Y. County Clerk Index 19,614 (1935); *Freedman v. Zaretsky*, N. Y. L. J., March 5, 1936; *Hartman v. Cooper*, N. Y. L. J., January 21, 1936; *Hydrox Ice Cream Co. v. Doe*, 250 A. D. 770, 293 N. Y. S. 1013 (1937); *Independent Gas & Electric Union v. Consolidated Edison Co.*, N. Y. L. J., May 20, 1938, p. 2452; *Jay Bee Syrup Co. v. Goldstein*, N. Y. L. J., Oct. 17, 1938, p. 1158; *Jones Foods Inc. v. Doe*, N. Y. L. J., May 16, 1939; June 15, 1939, p. 2771; *Jortner v. Winokur*, N. Y. L. J., Dec. 2, 1938, p. 1924; *Kirkman v. Penner*, N. Y. L. J., June 9, 1938, p. 2788; *Kirschner v. Rappaport*, N. Y. L. J., June 27, 1936; *M. Buchsbaum & Sons v. Doe*, N. Y. County Clerk Index 17,418 (1936); *Meehan v. Beauty Culturists Union*, N. Y. L. J., May 11, 1938, p. 2285; *Michael v. Devery*, N. Y. L. J., July 11, 1939, p. 79; *Murphy v. Ralph*, 165 Misc. 335, 299 N. Y. S. 270 (1937); *National Neon Sign Co. v. Doe*, N. Y. L. J., Feb. 6, 1936, p. 676; *Orlando Mills Inc. v. Levenson*, N. Y. L. J., June 15, 1938, p. 2891; *People ex. rel. Sandnes v. Sheriff of Kings County*, 164 Misc. 355, 299 N. Y. S. 9 (1937); *Raymond Upholstery Co. v. Bandler*, Bronx County Clerk Index 9,814 (1935); *Ridge Stores, Inc. v. Janow*, N. Y. L. J., March 17, 1938, p. 1320; *Saito v. Waiters Union*, N. Y. L. J., April 12, 1939, p. 1676; *Santini Bros. v. McKenna*, Bronx County Clerk Index 3,433 (1935); *Tudor Shoe Co. v. Epstein*, N. Y. County Clerk Index 17,011 (1937); *William Nellin Inc. v. Rosen*, N. Y. L. J., May 5, 1939, p. 1562; *Willoughby Camera Stores, Inc. v. McDonough*, N. Y. L. J., June 20, 1939, p. 2850; July 11, 1939, p. 79; *Holland Laundry Inc. v. Lindquist*, N. Y. L. J., Nov. 3, 1939, p. 1469.

<sup>44</sup> *Supra*, pp. 115-118. Note particularly the picketing provisions of the Wisconsin and New York anti injunction acts.

dispute," from enjoining persons participating or interested in such dispute from (a) ceasing to perform work and (b) "giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence." Read and applied literally, the effect of these clauses is an approximation of the position taken by the New York Court of Appeals in the *Stillwell* case.<sup>45</sup> On the authority of the anti-injunction acts, peaceful picketing without an accompanying strike has been allowed by courts in Louisiana,<sup>46</sup> New York,<sup>47</sup> Pennsylvania,<sup>48</sup> Minnesota<sup>49</sup> and Wisconsin,<sup>50</sup> but censured in Massachusetts.<sup>51</sup> Federal courts<sup>52</sup> and the Supreme Court of Oregon,<sup>53</sup> on the same authority, have affirmed this privilege where the issue of rival unionism existed. On the whole,<sup>54</sup> the courts

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<sup>45</sup> See 45 *Yale Law Journal* 1320 (1936); 50 *Harvard Law Review* 1300 (1937).

<sup>46</sup> *Dehan v. Hotel and Restaurant Employees*, 159 So. 637 (La. 1935).

<sup>47</sup> *Goldfinger v. Feintuch*, 276 N. Y. 281, 11 N. E. (2d) 910 (1937).

<sup>48</sup> *Lipoff v. United Food Workers*, C. C. H. par. 18,105 (1938). See, however, page 136 for the effects of the amendment to the Pennsylvania anti-injunction act.

<sup>49</sup> *Lichterman v. Laundry & Dry Cleaning Drivers Union*, 282 N. W. 689, 283 N. W. 752 (1938). See, however, page 139 for the effects of the new Minnesota labor relations act.

<sup>50</sup> *American Furniture Co. v. I. B. of T. C.*, 222 Wis. 338, 268 N. W. 250 (1936); *Senn v. Tile Layers Protective Union*, 222 Wis. 383, 268 N. W. 270 (1936). See, however, page 135 for the effects of the amendments to the Wisconsin anti-injunction act.

<sup>51</sup> *Simon v. Schwachman*, 18 N. E. (2d) 1 (1938). The Court relied, however, upon the differences between the Massachusetts and Federal anti-injunction acts, and implied that a contrary conclusion might have been reached had the former conformed to the latter.

<sup>52</sup> *Dean v. Mayo*, 8 F. Supp. 73, 9 F. Supp. 459 (1934); *Donnelly Garment Co. v. I. L. G. W. U.*, 23 F. Supp. 998, *reversed* 99 Fed. (2d) 309 (1938); *Fur Workers Union v. Fur Workers Union*, 105 Fed. (2d) 1 (1939); *Houston & North Texas Motor Freight Lines v. International Brotherhood of Teamsters*, 24 F. Supp. 619 (1938); *Laclede Steel Co. v. Newton*, 6 F. Supp. 625, 80 Fed. (2d) 636 (1935); *Miller Parlor Furniture Co. v. Furniture Workers Industrial Union*, 8 F. Supp. 209 (1934); *Sharp & Dohme v. Storage Warehouse Employees Union*, 24 F. Supp. 701 (1938).

<sup>53</sup> *George B. Wallace Co. v. I. A. M.*, 155 Or. 652, 63 Pac. (2d) 1090 (1935). See, however, page 135 for the effect of the Oregon Anti-Picketing Law of 1938.

<sup>54</sup> See, however, *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 63 Pac. (2d) 397 (1935); *Safeway Stores, Inc. v. Retail Clerks Union*, 184 Wash. 322, 51 Pac. (2d) 372 (1935); *Adams v. Building Service Employees Union*, 84 Pac. (2d) 1021 (Wash. 1938); *Busch Jewelry Co. v. United Retail Employees Union*, 281 N. Y. 150, 22 N. E. (2d) 320 (1939).

have recognized the power of their respective legislatures to limit the enjoynability of picketing "not involving fraud or violence."<sup>55</sup>

The courts are permitted, however, to enjoin picketing and advertising involving fraud or violence, when the conditions precedent to the granting of an injunction as outlined in Section 7 have been fulfilled. The controversial points in this connection are, first, what constitutes fraud or violence, and secondly, what is the effect of violent and fraudulent conduct upon the statutory right of peaceful picketing? As to the former, it was implied in at least one case that picketing an employer in an effort to coerce him into violating his legal duty to bargain with a rival union constituted a species of fraud enjoynable notwithstanding the statutory prohibition.<sup>56</sup> On the second point, a judge of the New York Supreme Court held that the prohibition of the enjoining of peaceful picketing was "merely declaratory of the law as it existed prior to the passage of section 876-a and that, therefore, an injunction prohibiting all picketing may be issued where, in the opinion of the trial court, the facts are such as to indicate the danger of continued unlawful picketing and injury to plaintiff's property if any picketing whatsoever is allowed."<sup>57</sup> This decision was affirmed by the New York Court of Appeals. In a confused opinion, that court held that the effect of the state anti-injunction act "is to prevent courts from enjoining peaceful picketing," but then went on to say that "When unions . . . wilfully and with full knowledge that their acts are il-

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<sup>55</sup> In one important respect, the anti-injunction legislation has tended to work against unions. It has been held that a suit by a union to enforce a collective agreement involves a labor dispute, making it difficult to secure an order of specific performance: *Bulkin v. Sacks*, 2 Labor Relations Reporter 5 (Pa. Com. Pleas. 1938); *Freedman v. Zaretsky*, N. Y. L. J., Mar. 5, 1936; *Moreschi v. Mosteller*, 28 F. Supp. 613 (1939); *Tobin v. Shapiro*, 2 Labor Relations Reporter 6 (Pa. Com. Pleas. 1938). *Contra*: *Amsterdam & Co. v. Devery*, N. Y. L. J., April 14, 1938; *Associated Flour Haulers v. Sullivan*, 168 Misc. 315, 5 N. Y. S. (2d) 982 (1938); *Greater City Master Plumbers Ass'n. v. Kahme*, 6 N. Y. S. (2d) 589 (1937); *Murphy v. Ralph*, 165 Misc. 335, 299 N. Y. S. 270 (1937).

<sup>56</sup> *Donnelly Garment Co. v. I. L. G. W. U.*, 99 Fed. (2d) 309 (1938).

<sup>57</sup> *Busch Jewelry Co. v. United Retail Employees Union*, 5 N. Y. S. (2d) 575, 168 Misc. 224 (1938). For adverse comment upon this decision, see 52 *Harvard Law Review* 1183 (1939); 7 *I. J. A. Bulletin* No. 9 (1939). See also *Baillis v. Doe*, 4 Labor Relations Reporter 868 (N. Y. Sup. 1939). In an earlier case, *D. & C. Dairy, Inc. v. Winokur*, Kings County Clerk Index 15,283 (1936), all picketing was enjoined despite the finding of a labor dispute and the lack of the necessary allegations.

legal, advise and encourage the commission of acts which are in violation of law and result in disorderly conduct and breach of the peace, they are no longer entitled to the benefits of special statutes enacted to protect them in the enjoyment of their conceded right of peaceful picketing."<sup>58</sup>

The sounder view is that peaceful picketing in a *bona fide* labor dispute may not be enjoined. A United States Circuit Court of Appeals has held:

Section 4 of the Act . . . enumerates certain acts not subject to injunctive relief. The test is objective; not the purpose or intent of the acts sought to be restrained, and not even their illegality; but whether they come under Section 4.

A strike . . . cannot be enjoined. Whether or not the strike in this case is illegal, because of its purpose . . . is therefore beside the point . . . .

If the picketing is peaceful, unaccompanied by acts of violence, irrespective of whether it may be mass picketing . . . it cannot be enjoined by a Federal court.<sup>59</sup>

A federal district judge, although of the belief that "a peaceful picket or peaceable picketing is a myth," nevertheless felt constrained to permit the continuance of a picket line.<sup>60</sup> And, in general, the "dissemination of truthful information" and the "giving of truthful publicity" are held to be "adjuncts of the legal right to picket peacefully. But when false statements are made they will be met with the same judicial determination as illegal methods of picketing."<sup>61</sup>

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<sup>58</sup> *Busch Jewelry Co. v. United Retail Employees Union*, 281 N. Y. 150, 22 N. E. (2d) 320 (1939), Justice Lehman dissenting. The Supreme Judicial Court of Massachusetts arrived at a similar conclusion, although through more plausible reasoning. *Simon v. Schwachman*, 18 N. E. (2d) 1 (1938). For critical comment on the Busch case, see Osmond K. Frankel, "Judicial Interpretation of Labor Laws," 6 *University of Chicago Law Review* 577 (1939); "Decline of the New York Court of Appeals," 8 *I. J. A. Bulletin* No. 4 (1939); "The New York Anti-Injunction Act," 49 *Yale Law Journal* 537 (1940).

<sup>59</sup> *Wilson & Co. v. Birl*, 105 Fed. (2d) 948 (1939). Accord: *Houston & North Texas Motor Freight Lines v. I. B. of T.*, 24 F. Supp. 619 (1938); dissent of Judge Biggs in *Retail Food Clerks Union v. Union Premier Food Stores*, 98 Fed. (2d) 821 (1938).

<sup>60</sup> *Tri-Plex Shoe Co. v. Cantor*, 25 F. Supp. 996, 27 F. Supp. 295 (1939).

<sup>61</sup> *Gambarelli v. Oneto*, N. Y. L. J., Dec. 23, 1937, p. 2330; Accord: *La Clede Steel v. Newton*, 80 Fed. (2d) 636 (1935); *Miller Parlor Furniture Co. v. Furniture Workers Industrial Union*, 8 F. Supp. 209 (1934); *Knapp Monarch Co. v. Anderson*, 7 F. Supp. 332 (1934); *Dehan v. Hotel*

Until the Supreme Court of the United States rules specifically upon rival union picketing, it is hardly possible to forecast its future status.<sup>62</sup> An additional complicating factor, the National Labor Relations Act, will be discussed below. Of the anti-injunction legislation in general, however, it is perhaps fair to say that the broad scope of a "labor dispute," as defined by the Supreme Court, is likely to relegate to a place of secondary importance the question whether such a "labor dispute" exists in a given controversy, and to result in closer scrutiny of the means employed in its promotion, with increased emphasis upon the necessity for finer distinctions between enjoinable and inviolable activities.<sup>63</sup>

Before leaving, for the moment, the anti-injunction legislation, it is perhaps appropriate to refer briefly to Section 8 of the Act, wherein it is provided that no complainant "who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery or mediation or voluntary arbitration" shall secure injunctive relief. Characteristically, in genuine rival union disputes, the employer has agreed to bargain exclusively with one of the contestants, and is therefore debarred from mediating or negotiating with the other. Since it is manifestly inequitable to require the performance of acts legally impossible, it has been intimated that under the circum-

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& Restaurant Employees, 159 So. 637 (La. 1935); *George B. Wallace Co. v. I. A. M.*, 155 Or. 652, 63 Pac. (2d) 1090 (1936); *Glover v. Parson*, 9 N. E. (2d) 109 (Ind. 1937); *Senn v. Tile Layers Protective Union*, 222 Wis. 383, 268 N. W. 270 (1936); *Buy Wise Market v. Winokur*, 167 Misc. 235, 2 N. Y. S. (2d) 854 (1938); *Rand Tea & Coffee Stores v. Manganero*, N. Y. L. J., Jan. 5, 1938, p. 53. See also 120 *American Law Reports* 316 (1938).

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<sup>62</sup> See, however, *Fur Workers Union v. Fur Workers Union*, 105 Fed. (2d) 1, *aff'd.* without opinion, 60 S. Ct. 292 (1939), for some indication of its position.

<sup>63</sup> The decision of the U. S. Circuit Court of Appeals in *Wilson & Co. v. Birl*, 105 Fed. (2d) 948 (1939), is illustrative of the manner in which the more progressive courts are attacking the problem: "We are of the opinion that Federal Courts may no longer issue general injunctions against striking, but only to restrain specific acts of individuals . . . ." See also: *Eagle Pencil Co. v. Carey*, N. Y. County Clerk Index 15,602 (1938); *Eastwood-Neally Corp. v. International Association of Machinists*, N. J. Chancery, 1 Atl. (2d) 477 (1938); *Mante Brothers Bakery v. Christel*, Bronx County Clerk Index 10,346 (1935); *Roth v. Local Union No. 1460*, C. C. H. par. 18,509 (Ind. 1939).

stances non-compliance with Section 8 would constitute no bar to injunctive relief.<sup>64</sup>

#### B. NATIONAL INDUSTRIAL RECOVERY ACT, SECTION 7A

The few relevant suits entertained by the courts under 7a<sup>65</sup> were predicated upon the principle that the statute conferred upon private individuals and collective groups of employees certain rights enforceable in equity.<sup>66</sup> In a leading case, an employer was enjoined from making it a condition of employment that his employees, the majority of whom were already organized in a union of their own choice, join a *bona fide* rival labor organization. The court ruled:

This enactment [Section 7a] embodied in the [President's Reemployment Agreement], gave complainants, while they were employees of defendant and constituted a majority of such employees engaged in rabbit dressing, the right to organize themselves as members of the Needle Trades Union and the right, if they so chose, to bargain collectively through the agents of that union. Defendant could not, without breach of its agreement, coerce them into a different organization or compel them to accept as their representative an agent of the Fur Workers [rival] Union . . . . If a majority of the employees are members of a particular union or desire to organize within a particular union, the employer cannot dictate to them another union.<sup>67</sup>

In a similar case, however, preliminary injunctive relief was refused upon the ground that there was no clear proof of employer coercion, although it was brought out that the employer, who, prior to the temporary closing of his plant, had employed members of the International Fur Workers Union, hired members of the rival Needle

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<sup>64</sup> Hedges-Walsh-Weidner v. Duffy, C. C. H. par. 16,066 (U. S. D. C. 1934); Weil & Co. v. Doe, 168 Misc. 211, 5 N. Y. S. (2d) 559 (1938); Hertzog v. Gibbs, 3 N. E. (2d) 831 (Mass. 1936). Judge Otis, dissenting in Donnelly Garment Co. v. I. L. G. W. U., 21 F. Supp. 807 (1937) remarked: ". . . the law never requires an entirely or obviously useless thing, and section 8 would constitute no obstacle to the issuance of an injunction."

<sup>65</sup> 48 U. S. Stat. 195 (1933).

<sup>66</sup> The validity of this view was denied in Stanley v. Peabody Coal Co., 5 F. Supp. 612 (1934), where the court held: "There is no provision in the National Industrial Recovery Act . . . giving the right to any private individual to institute proceedings to compel obedience to the act itself or a code promulgated under it . . . . The National Industrial Recovery Act provides no remedy in equity for the preservation of alleged private rights." Accord: Western Powder Manufacturing Co. v. Interstate Coal Co., 5 F. Supp. 619 (1934); U. S. v. Houde Engineering Corp., 9 F. Supp. 836, 9 F. Supp. 843 (1935).

<sup>67</sup> Fryns v. Fair Lawn Fur Dressing Co., 114 N. J. Eq. 462, 168 Atl. 862 (1933). See 43 Yale Law Journal 625, "Labor Injunctions Since the N. R. A." (1934).

Trades Workers Industrial Union exclusively, upon resumption of operations.<sup>68</sup>

A reflection of the closed shop controversy is found in a few scattered decisions, the majority to the effect that attempts to secure closed shop contracts were violative of the policy of the United States, since they deprived non-union employees of rights granted by Section 7a.<sup>69</sup>

The right of employees to be free from employer coercion and to join unions of their own choosing was acknowledged<sup>70</sup> and even protected by equitable decree in the courts of New York.<sup>71</sup> The demise of N. R. A. prevented serious collision, in New York, between the *Stillwell* doctrine and the rights granted by 7a, for the picketing of rival union shops to secure contractual rights would, if successful, have infringed upon the statutory rights of members of the defeated rival.

The difficulties arising out of dissension among the Illinois coal miners have already been related. In two cases springing from this bitter internecine warfare, the National Bituminous Coal Labor Board upheld collective agreements entered into between coal operators and the United Mine Workers, against the plea by the Progressive Miners that the contracts were illegally coercive under 7a. In one of these cases, a Federal court rebuffed the appeal of the

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<sup>68</sup> *Adelman v. Universal Fur Dressing Co.*, 116 N. J. Eq. 511 (1934).

<sup>69</sup> *Colonial Baking Co. v. Hatzenbach*, C. C. H. par 16,110 (U. S. D. C. 1934); *Drake Bakeries Inc. v. Bowles*, 31 Ohio N. P. 425 (1934); *Elkind and Sons v. Retail Clerks Union*, 114 N. J. Eq. 586, 169 Atl. 494 (1933); *Lichtman & Sons v. Leather Workers Industrial Union*, 169 Atl. 498 (N. J. 1933). *Contra*: *Rosenthal v. Schlossberg*, 266 N. Y. S. 762 (1933); *Buckingham Cafeteria v. Mesevitch*, N. Y. L. J., Sept. 22, 1933; *Farulla v. Freundlich*, 274 N. Y. S. 70, 279 N. Y. S. 228 (1935). For discussion, see "Effect of Section 7a on the Validity of a Closed Union Shop Contract," 44 *Yale Law Journal* 1067 (1935).

<sup>70</sup> *Sherman v. Washington Bridge Theater Corp.*, N. Y. L. J., Feb. 15, 1934, p. 780, and twelve similar actions at the same place.

<sup>71</sup> *Sherman v. Abeles*, 150 Misc. 497, 269 N. Y. S. 849, *aff'd*. 241 A. D. 676, 269 N. Y. S. 864 (1934). The decree ordered an employers' association, accused of fomenting rival unionism, to refrain "1. From interfering directly or indirectly with the right of their employees to organize and bargain collectively . . . 2. From requiring directly or indirectly any employee or one seeking employment, as a condition of employment, to join any company union or to refrain from joining . . . a labor organization of his own choosing." The decree was reversed on the evidence by the Court of Appeals, 265 N. Y. 383, 193 N. E. 241, 95 A. L. R. 1348 (1934).

Progressive Union from the decision of the code board upon the ground that "No authority has been submitted . . . to sustain a right to impeach the integrity of the final judgment of an administrative board . . . without some specific statutory provision therefor."<sup>72</sup> In the second suit, brought by an employer to restrain picketing and interference with the rights of employees, a District Court refused to grant relief because of the Norris Act,<sup>73</sup> but was overruled by the Circuit Court of Appeals which relied upon the doctrine of inducing breach of contract.<sup>74</sup>

It might be an interesting intellectual exercise to speculate upon the effects of Section 7a on the law of trade unionism, and more particularly, upon that portion of the common law regulating the relationships between rival unions. The problem is now an academic one, however, and conclusions must be based upon dangerously small samples. Neither employer nor employee succeeded in establishing and consistently maintaining any novel rights wholly predicated upon the vague statements contained in 7a. The outstanding achievement of this controversial section seems to have been the creation of an atmosphere of dynamic legal change, evidenced in the increasing circumspection with which judges regarded the delicate mechanism of the employment relationship, sufficient to justify the assertion that "for the first time opponents of collective bargaining and supplemental labor rights appear to be on the defensive."<sup>75</sup>

### C. THE LABOR RELATIONS ACT

At the present writing, this subject is just emerging from its swaddling clothes, but enough has been written by the courts to permit the segregation of certain lines of thought that may fairly lay claim to future employment. When the confusion attendant upon the introduction of this legislation, marking as it does a revolutionary breach with traditional legal concept, has somewhat

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<sup>72</sup> *Progressive Miners of America v. Peabody Coal Co.*, 7 F. Supp. 340 (1934).

<sup>73</sup> *United Electric Coal Co. v. Rice*, 9 F. Supp. 635 (1934).

<sup>74</sup> *Ibid.*, 80 Fed. (2d) 1 (1935).

<sup>75</sup> "Impact of the Courts Upon the N. R. A. Program," 44 *Yale Law Journal* 90 (1934).

abated, it may be possible to suggest a more complete reclassification of rights and privileges than will be attempted herein.

Imposition upon the employer of the duty to enter into a bargaining relationship with his employees, acting collectively rather than individually, constitutes the most important innovation<sup>76</sup> of the Labor Relations Act,<sup>77</sup> the constitutional validity of which has been established.<sup>78</sup> Other provisions of the Act define, enforce and facilitate the performance of the newly established obligation. One of the most perplexing tasks confronting the courts is determination of the extent to which judicial guidance may properly be exercised in clarifying the scope of this duty and the correlative rights of employees when more than one organization of employees demand exclusive bargaining rights. Consideration of this question may best be divided into two periods of time: (a) that prior to the designation of one organization of employees as exclusive bargaining agency by the National Labor Relations Board, pursuant to the provisions of Section 9(c); and (b) the period subsequent to formal certification by the Board.

(a) It has been held that although the employer is under the affirmative duty to bargain<sup>79</sup> with the representatives of a "proper"<sup>80</sup>

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<sup>76</sup> It is an exaggeration to maintain, of course, that the labor relations acts were unprecedented. A duty to bargain collectively was laid upon the railroads of the United States by the Railway Labor Act of 1926, upheld by the United States Supreme Court in *Texas and New Orleans Rwy. v. Brotherhood of Railway Clerks*, 281 U. S. 548 (1930), and implied in Section 7a of the N. R. A., but no court, in the absence of the statutory preface, has held it incumbent upon the employer thus to deal with his employees. "The privilege of organizing for purposes of collective bargaining is a semi-common law privilege, but the right of the employee that the employer bargain collectively is a new concession to labor." 86 *University of Pennsylvania Law Review* 79 (1937).

<sup>77</sup> The terms "Labor Relations Act" or "Act" as used in this section refer both to the federal and state statutes, unless otherwise noted. Reference numbering cited is that of the federal act.

<sup>78</sup> *N. L. R. B. v. Freedman-Harry Marks Clothing Co.*, 301 U. S. 58 (1937); *N. L. R. B. v. Fruehauf Trailer Co.*, 301 U. S. 49 (1937); *N. L. R. B. v. Jones & Laughlin Steel Co.*, 301 U. S. 1 (1937); *Metropolitan Life Insurance Co. v. New York State Labor Relations Board*, 280 N. Y. 194, 20 N. E. (2d) 390 (1939); *Wisconsin Labor Relations Board v. Fred Rueping Leather Co.*, 279 N. W. 673 (1938); *United Shoe Workers v. Wisconsin Labor Relations Board*, 279 N. W. 37 (1938).

<sup>79</sup> A good discussion of the scope of the obligation to bargain is contained in *Globe Cotton Mills v. N. L. R. B.*, 103 Fed. (2d) 91 (1939); *N. L. R. B. v. Griswold Manufacturing Co.*, 106 Fed. (2d) 713 (1939).

majority<sup>81</sup> of his employees, and under the negative duty to refrain from bargaining with any minority in the presence of a majority,<sup>82</sup> nevertheless, prior to certification by the Board, the statute does not authorize a court of equity to enforce the employer's right to carry out his obligation or to promote in any way the process of negotia-

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<sup>80</sup> See Latham, "The National Labor Relations Act," 4 *George Washington Law Review* 433 (1936). What constitutes a "proper" or "recognizable" majority in advance of Board investigation is a question of fact. Although there may be exceptional cases, it cannot be incorrect to say that generally the employer is either aware of the prevailing sentiment among his employees regarding their choice of representation, or may ascertain the fact without great difficulty. If, however, there is genuine doubt, it is not an unfair practice for the employer to refuse to bargain prior to an election. *N. L. R. B. v. Empire Furniture Co.*, 107 Fed. (2d) 92 (1939). See also *N. L. R. B. v. Remington Rand*, 94 Fed. (2d) 862 (1938); Note, 47 *Yale Law Journal* 799 (1938).

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<sup>81</sup> This does not apply with full force, however, to employers subject to the old Wisconsin Labor Relations Act: ". . . whether the all-union agreement is made with a legitimate union that has a majority, minority, or none at all, of the plant's employees in its organization, that contract to unionize the shop in that particular union stands *above any law, code or other agreement*. The legislature has said so in unescapable terms." *United Shoe Workers v. Wisconsin Labor Relations Board*, Wis. Cir. Ct. (1937).

<sup>82</sup> "At least when the majority has selected representatives and made a demand for a collective agreement, the employer is not permitted to deal with any other group or groups." Feinsinger and Rice, *op. cit.* at chap. viii, n. 102, p. 32.

See, however, the dissent of Judge Otis in *Donnelly Garment Co. v. I. L. G. W. U.*, 21 F. Supp. 807 (1937), in which he says, in part: "While the Labor Relations Act impliedly prohibits an employer bargaining with others than the chosen representatives of a majority of the employees. . . most clearly it does not prohibit negotiations between an employer and a national or international union concerning organization of the employer's employees by that union and the ultimate representation of the employees by the union. And that is true whether there is or is not an existing union." May it not be argued, however, that negotiations concerning representation are included in the term "other conditions of employment" and that an employer acting in the suggested manner might be guilty of an unfair practice under 8(3)? On broader grounds, any employer interference with the choice of employee representatives is repugnant to the declared purposes of the statute.

Judge Otis also maintains, in disposing of the contention that the Act forbids negotiations between an employer and a minority union concerning hours and wages, that "It does not do that. It impliedly (and only impliedly) forbids plaintiff's entering into a contract with others than representatives of a majority of its employees." But how may this statement be reconciled with the exclusive bargaining privileges granted to the majority by section 9(a)?

tion.<sup>83</sup> An equitable order enjoining interference with any of the steps in the employer-majority transactions in the presence of "questions . . . concerning the representation of employees" would encroach upon the exclusive power vested in the Board by Section 10(a) and prejudice the issue.<sup>84</sup> Furthermore,

there is no provision in the Wagner Act which makes it illegal for a minority to strike and to seek thereby to obtain sufficient strength so as to become the sole bargaining agency. If plaintiff's construction of the act is to be sustained, then an employer could organize a company union and by injunction prevent a so-called employees' union from gaining any foothold, which result would be absolutely contrary to the intent and aims of the Act in question.<sup>85</sup>

Still more definite is Section 13, reading: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." If an equity decree against a minority union strike were to be predicated upon any interpretation of the required bargaining duties, *ipso facto* the Act would create a new basis for procuring injunctive relief against trade union activities, and thus operate to qualify the right to strike. All these contentions narrow down to the proposition that enforcement of the duty to bargain is properly a matter for the appropriate labor board, and that judicial intervention prior to final order of the board is violative of

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<sup>83</sup> *G. A. Lund Co. v. Woodenware Workers Union*, 19 F. Supp. 607 (1937); *N. L. R. B. v. Delaware-New Jersey Ferry Co.*, 90 Fed. (2d) 520 (1937), dissent of Judge Biggs; *Blankenship v. Kurfman*, 96 Fed. (2d) 450 (1938); *Eastwood-Neally Corp. v. International Association of Machinists*, 1 Atl. (2d) 477 (N. J. 1938).

<sup>84</sup> *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *Newport News Shipbuilding Co. v. N. L. R. B.*, 303 U. S. 54 (1938); *United Shoe Workers v. Wisconsin Labor Relations Board*, 279 N. W. 37 (Wis. 1938); *The Saccarrappa*, 21 F. Supp. 417 (1937); *Nevins Inc. v. Boland*, 3 N. Y. S. (2d) 323 (1938); *Gagelman v. Trans-Boro Mgt. Corp.*, 2 Labor Relations Reporter 14 (N. Y. Sup. 1938); *United Baking Co. v. Boland*, C. C. H. par. 18,316 (N. Y. Sup. 1939); *Hanley v. Boland*, N. Y. Sup. (1939).

The exclusive jurisdiction of the New York Board was successfully attacked in a peculiar fashion. A union had agreed to drop charges of unfair labor practices in return for a consent election, under Board auspices. Upon losing the election to a rival, however, it renewed the charges, whereupon it was enjoined from submitting testimony before the Board relevant to those charges on the ground that this would constitute breach of contract. *United Baking Co. v. Bakery and Confectionery Workers Union*, 9 N. Y. S. (2d) 964, 170 Misc. 199 (1939). See also in this connection *Surpass Leather Co. v. Winters*, C. C. H. par. 18,174 (U. S. D. C. 1938).

<sup>85</sup> *Lund v. Woodenware Workers Union*, 19 F. Supp. 607 (1937).

Sections 7, 10(a) and 13 of the Act, as well as contrary to the public policy expressed therein.

From an opposite point of view, imposition of the duty contained in Section 8(5) "must of necessity carry with it the right on the part of the employer to insist upon and enforce, if necessary, its right to perform that duty,"<sup>86</sup> in spite of the lack of specific provision in the Act. This would be particularly true if it were further held that a labor union, organized in conformance with the National Labor Relations Act, is entitled to "invoke the protection that must follow from its provisions" of a court of equity.<sup>87</sup> The Supreme Court of the United States, in affirming an injunction restraining a railroad corporation from violating the collective bargaining provisions of the Railway Labor Act of 1926, used language which might be regarded as authority for this position:

The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty . . . but in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each. The same is true of the prohibition of interference or coercion in connection with the choice of representatives. The right is created and the remedy exists . . . .<sup>88</sup>

A novel theory in support of equitable intervention in advance of Board adjudication stems from Section 10(a), which confers exclusive power upon the Board. Holding that when the Board has assumed jurisdiction over a controversy the courts may prohibit any interference with the quasi-judicial process, since "it is just as necessary to the jurisdiction of the Labor Board that it should be free from interference in making its determinations as after its orders had been made," an *ad interim* order restraining picketing was granted by a Federal District Court, pending the termination of the Board's investigation.<sup>89</sup> An extension of this theory might lead to

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<sup>86</sup> *The Grace Co. v. Williams*, 20 F. Supp. 263 (1937).

<sup>87</sup> *Donnelly Garment Co. v. I. L. G. W. U.*, 21 F. Supp. 807 (1937).

<sup>88</sup> *Texas and New Orleans Railway v. Brotherhood of Railway Clerks*, 281 U. S. 548 (1929). It will be recalled, however, that the labor relations acts provide definite penalties for violations.

<sup>89</sup> *Union Premier Foods Stores v. Retail Food Clerks Union*, C. C. H. par. 18,170 (U. S. D. C.), affirmed on other grounds, 98 Fed. (2d) 821 (1938), 101 Fed. (2d) 475 (1939), reversed by the Supreme Court because the cause became moot (1939).

the conclusion that in all controversies over which the Board possesses exclusive jurisdiction the courts are justified in issuing injunctions aimed at maintenance of the status quo, "in order to permit the board to exercise an untrammelled jurisdiction."<sup>90</sup>

(b) A much stronger case for equitable intervention can be made out in the event that the Board, either by certification<sup>91</sup> or by cease and desist order, has designated one of two or more competing unions as the exclusive representative for the purpose of collective bargaining. Chief Justice Hughes, in a leading case, ruled:

The decree which we affirmed in that case [*Virginia Rwy. Co. v. System Federation No. 40*] required the Railway Company to treat with the representative chosen by the employees and also to refrain from entering into collective labor agreements with anyone other than their true representative as ascertained in accordance with the provisions of the Act. We said that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other. . . . We think this construction also applies to Section 9(a) of the National Labor Relations Act.<sup>92</sup>

A substantially similar result was achieved in the case cited by the Chief Justice.<sup>93</sup> There, Justice Stone, after noting the obligation of the employer to deal with the properly designated union, continued:

There is no want of capacity in the court to direct complete performance of the entire obligation; both the negative duties . . . not to negotiate with any representative of the employees other than respondent and the affirmative duty to treat with respondent . . . the extent to which equity will go to give relief when there is no adequate remedy at law is not a matter of fixed rule. It rests rather in the sound discretion of the court.

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<sup>90</sup> *Idem*.

<sup>91</sup> Certification, however, has no formal legal effect. "This is not a final order. It is in fact not an order at all, but simply the certification of a fact which may be entirely ignored and disregarded . . . . The Company may go on with impunity bargaining with the Association just as though no certification had been made." *United Employees Association v. N. L. R. B.*, 96 Fed. (2d) 875 (1938).

Accord: *American Federation of Labor v. N. L. R. B.*, 103 Fed. (2d) 933, *aff'd*, 60 S. Ct. 300 (1940); *International Brotherhood of Electrical Workers v. N. L. R. B.*, 60 S. Ct. 306 (1940); *N. L. R. B. v. The Falk Corporation*, 60 S. Ct. 307 (1940).

<sup>92</sup> *N. L. R. B. v. Jones & Laughlin Steel Co.*, 301 U. S. 1 (1937).

<sup>93</sup> *Virginia Railway Co. v. System Federation No. 40.*, 300 U. S. 515 (1937). See, however, *Fur Workers Union v. Fur Workers Union*, 105 Fed. (2d) 1 (1939), *aff'd*, 60 S. Ct. 292 (1939), where it is said that neither the Texas nor Virginia Railway case is "authority for an action by either an employer or employees to restrain picketing," in view of the fact that in the foregoing cases employees were suing employers, rather than vice versa.

In view of the foregoing decisions, it does not seem likely<sup>94</sup> that an employer who had been ordered by the Board to treat with one union of his employees would be refused equitable aid in curbing rival union interference with the proper performance of that duty by the very court which had commanded compliance with the order in question.<sup>95</sup> A contrary conclusion involves the employer in an insoluble and inequitable contradiction,<sup>96</sup> whereby he is overwhelmed either by judicial or economic coercion.<sup>97</sup> Color is lent to the essential reasonableness of this conclusion by a dictum of the Supreme Court in the *Virginia Railway* case:

Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief.<sup>98</sup>

On the other hand, it has been held that the Act makes no provision "which can be construed as intending to create rights for employees which can be enforced . . . independently of action by the

<sup>94</sup> Leaving aside for the moment, however, the effect of the anti-injunction statutes.

<sup>95</sup> "A strike and picketing, intended to induce the employer to engage in an 'unfair labor practice' as defined by Congress, or to act contrary to the policy of the United States, are unlawful under the law of New Jersey because they have an unlawful purpose." *Eastwood-Neally Corp. v. International Association of Machinists*, 1 Atl. (2d) 477 (N. J. 1938).

<sup>96</sup> "The plaintiff company is ground between the nether millstone of the order of the National Labor Relations Board and the upper millstone of the strike activities of the defendants which are destroying the plaintiff company's business. A court of equity should, if it is possible to do so, grant relief in a case such as this where every principle of justice demands that relief be given." *Square Deal Clothing Co. v. Federated Raiment Laborers*, Printed Briefs for Moot Court Trial, Harvard University Law School, January, 1938. See also *South End Express Co. v. Newspaper and Mail Deliverers Union*, C. C. H. par. 18,376 (N. J. Chancery 1939).

<sup>97</sup> An able commentator advances some very plausible arguments *against* the grant of such relief. Summarized, they are:

1. Since certification is not a final order, reviewable by the courts, a defeated union would have no legal recourse.

2. The defeated union may simply be asking for changes in labor conditions without demanding recognition, in which case the N. L. R. A. would be irrelevant.[?]

3. Restraint of a defeated union's use of economic pressure may result in undesirable stratification as to organization.

Note, 48 *Yale Law Journal* 1053 (1939).

<sup>98</sup> *Virginia Railway Co. v. System Federation No. 40*, 300 U. S. 515 (1937).

National Labor Relations Board."<sup>99</sup> The same argument might certainly be applied to employer rights. A vivid example of the logical outcome of this *laissez-faire* policy may be seen in the case of the *National Labor Relations Board v. Star Publishing Co.* In a jurisdictional struggle between the American Newspaper Guild and the International Brotherhood of Teamsters, respondent-employer acceded to the threats of the latter union and discharged members of the Guild. The Board found him guilty of an unfair labor practice and ordered reinstatement of the discharged men. The court met the employer's plea for revision of the Board's order with the assertion that "Respondent's contention in the last analysis, is that it is subjected to great hardship, which should . . . have been dealt with by Congress. We think that such an argument should be submitted to Congress but not to us."<sup>100</sup>

It was clearly Congressional intent in the Wagner Act to deal with only one phase of the employer-employee relationship—that concerned with the commission of unfair labor practices by the employer; any intimation that employee organization rights are curtailed thereby must, in the last analysis, be acknowledged as mere implicational constructions flowing out of the necessity of reconciling otherwise contradictory consequences. The Act confers upon the courts only the power to review and enforce or set aside orders promulgated by the Board, and it would appear more reasonable that they ground any further assumption of jurisdiction upon the historic power to remedy manifestly inequitable situations rather than upon the more specific duty of enforcing rights assumed to be created by the Act but not enforceable in law.<sup>101</sup>

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<sup>99</sup> *Blankenship v. Kurfman*, 96 Fed. (2d) 450 (1938).

<sup>100</sup> *N. L. R. B. v. Star Publishing Co.*, 97 Fed. (2d) 465 (1938). Similar conclusions were reached in *Fur Workers Union v. Fur Workers Union*, 105 Fed. (2d) 1 (1939), *aff'd*, 60 S. Ct. 292 (1939).

<sup>101</sup> This distinction is not merely one of words. If an employer is ordered to bargain with a union, failure to grant relief against rival union picketing subjects him to the hazard of economic coercion. On the one hand, the common law privilege of picketing under such circumstances must be weighed against the privilege of the employer to conduct his business unmolestedly, the balance being struck in accordance with prevailing judicial opinion. On the other hand, the privilege of picketing is weighed against a statutory right conferred upon the employer. The difference is that between a search for current public policy and the assumption that a definite public policy has been expressed.

*Collective Agreements and Change of Representation*—Although the stimulation of unfettered collective bargaining is the main purpose of the National Labor Relations Act, bargaining itself is but the penultimate step in the process of assuring the "stabilization of competitive wage rates and working conditions within and between industries." The desired end of collective negotiation is the promulgation of a collective agreement, embodying working rules as to terms and conditions of employment. The common law status of the labor contract has already been treated at some length, and here only the modifications induced by the passage of recent legislation need be considered.

Under the Act an employer may not enter into a collective agreement with an organization representing a minority of his employees<sup>102</sup> where a definite majority exists and demands exclusive bargaining privileges.<sup>103</sup> Where the situation has not congealed sufficiently to indicate even an inchoate majority, the employer may enter into members-only contracts with minority groups. A contract of this type was upheld by the United States Supreme Court<sup>104</sup> in spite of the fact that the Board found it to be part of a plan by the employer to favor a union over its rival.<sup>105</sup> However, the decision probably turned on the fairly narrow ground<sup>106</sup> that the favored union, whose contract was at issue, was not made a party to the proceedings, coupled with the further fact that the contracting union

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<sup>102</sup> Whether this was possible under the old Wisconsin Labor Relations Act was never decided.

<sup>103</sup> *N. L. R. B. v. Jones & Laughlin Steel Co.*, 301 U. S. 1 (1937).

<sup>104</sup> *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197 (1938). See also *N. L. R. B. v. Cowell Portland Cement Co.*, 108 Fed. (2d) 198 (1939).

<sup>105</sup> A full account of this interesting controversy may be found in Hearings before the Committee on Education and Labor, U. S. Senate, 76th Congress, 1st Session (1939), pp. 3888-3922.

<sup>106</sup> President Green of the A. F. of L. interpreted this decision as establishing the broad precedent that contracts signed with genuine labor unions could not be set aside by the Board. This was disputed by other authorities, including Charles Fahy of the N. L. R. B. and Lee Pressman of the C. I. O. (*N. Y. Times*, Dec. 11, 1938, p. 10E). See also: 52 *Harvard Law Review* 695 (1939); 87 *University of Pennsylvania Law Review* 716 (1939); William G. Rice, "The Legal Significance of Labor Contracts Under the National Labor Relations Act," 37 *Michigan Law Review* 693 (1939), note 48; 1939 *Wisconsin Law Review* 132 (1939).

The careful distinctions made by the Circuit Court of Appeals in *N. L. R. B. v. Stackpole Carbon Co.*, 105 Fed. (2d) 167 (1939), tends to substantiate the latter conclusion.

was an A. F. of L. affiliate,<sup>107</sup> the members of which had not been coerced into joining and were receiving the benefits of the contract.<sup>108</sup>

Difficulty is presented in the not infrequent situation where a group of employees shifts its union allegiance, with the result that a contracting organization finds itself bereft of the majority it possessed at the inception of the contract. Failure of the courts to take judicial notice of such migrations would result in the granting of permanent tenure to unions commanding majorities either when valid agreements are contracted or at the time elections are held under Board supervision.<sup>109</sup> On the other hand, automatic discontinuance of agreements whenever the contracting union ceases to represent a majority of the employees would introduce an element of instability tending to "thwart the very purpose of legislation enacted to encourage and legalize contracts for definite terms and fixed conditions between an employing industry and its employees . . . ."<sup>110</sup> Attempts have been made to reconcile this conflict of desiderata by regarding validly contracted collective agreements entered into for definite and *reasonable* terms as unaffected by transfers of majorities.<sup>111</sup> A similar conclusion is reached by arguing that Section 8(3), which permits a closed-shop agreement with a labor organization "if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement *when made*," [italics mine], requires only that the contracting union represent a majority at the time the contract is signed, and not sub-

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<sup>107</sup> Although the relevance of this finding is not entirely clear, since the Act makes no distinction between affiliated and non-affiliated organizations, the Court placed a good deal of emphasis upon it, probably to underline the alleged independence of the favored union.

<sup>108</sup> Justice Reed, in a dissenting opinion, maintained that these criteria were immaterial to a determination of the power of the Board to effectuate the policies of the Act by ordering the cessation of unfair practices.

<sup>109</sup> *N. L. R. B. v. Remington Rand*, 94 Fed. (2d) 862 (1938).

<sup>110</sup> *Pennsylvania Labor Relations Board v. Red Star Shoe Repairing Co.*, Pa. Com. Pleas, 2 Labor Relations Reporter No. 13 (1938).

<sup>111</sup> *Peninsular & Occidental S. S. Co. v. N. L. R. B.*, 98 Fed. (2d) 411, *cert. den.* 59 Sup. Ct. 248 (1939); *Waterman S. S. Co. v. N. L. R. B.*, 103 Fed. (2d) 157 (1939). Both these cases, however, involved the peculiar problems of the shipping industry, and may not be applicable generally. See "Inter-Union Disputes In the Shipping Industry," 48 *Yale Law Journal* 1053 (1939).

sequently, with the concession that unreasonably long term contracts may, in spite of their valid origin, defeat the policy expressed in the Act.<sup>112</sup>

Opponents of this view, taking their stand on Section 8(5) which makes it an unfair labor practice to refuse to bargain with the representatives of the employees as provided in Section 9(a),<sup>113</sup> insist that the Labor Board may at any time order the termination of a relationship then constituting an unfair labor practice, and that such power is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."<sup>114</sup> If this interpretation is not sustained, it is argued,

it would be a simple device for an employer to cause (in a manner either legal or at least undetectable) a friendly and inoffensive union to come in and organize his plant. The employer could then contract for exclusive bargaining with the friendly union for a long period of time. Then when an aggressive labor union appeared on the field and began to organize the employees the employer could rest easy in the knowledge that by his foresighted contract he had hamstrung the National Labor Relations Board and rendered the Act meaningless.<sup>115</sup>

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<sup>112</sup> Square Deal Clothing Co. v. Federated Raiment Laborers, *op. cit.* at n. 96, brief for defendants, pp. 16-21.

<sup>113</sup> "The membership of a union is constantly changing, and it may at any time cease to represent the majority; if it does, it loses its power to bargain for the unit." N. L. R. B. v. Remington Rand, 94 Fed. (2d) 862 (1938).

<sup>114</sup> Section 10 (a), National Labor Relations Act. See Square Deal Clothing Co. v. Federated Raiment Laborers, *op. cit.* at n. 96, brief for plaintiffs, pp. 12-13. An interesting question has arisen regarding the power of the Board to void a collective agreement, specific performance of which has been ordered by a court of equity. See Mason Manufacturing Co. v. United Furniture Workers, 2 Labor Relations Reporter 838 (Cal. 1938), 15 N. L. R. B. No 38; International Brotherhood of Electrical Workers v. National Electrical Products Corp., Prentice-Hall Labor Law Service par. 15, 642 (U. S. D. C. 1937), 3 N. L. R. B. 47. In the latter case, the International Brotherhood of Electrical Workers procured a declaratory judgment ordering compliance with the terms of a collective agreement which it had signed with the National Electrical Products Corp. The N. L. R. B., upon the appeal of a rival union, declared the contract void and ordered an election. In the election, however, the I. B. E. W. proved victorious, apparently rendering the issue moot. Had the rival union secured the majority, a nice question would have been posed. Examination of the proper procedure in such event is undertaken in a Note, 47 *Yale Law Journal* 779 (1938), and Note, 32 *Illinois Law Review* 353 (1937). It is the contention of both these reviews, and of the N. L. R. B., that the exclusive authority of the N. L. R. B. is unaffected by conflicting equity decrees of performance.

<sup>115</sup> Square Deal Clothing Co. v. Federated Raiment Laborers, *op. cit.* at n. 96, brief for plaintiffs, p. 14.

Some degree of permanence in representation must be assured if the Act is to fulfill its purpose of promoting orderly industrial relations<sup>116</sup> and if the employer is to be protected from the vagaries of shifting balances of power. But at the same time, over-solidification of a fluid union situation, such as usually exists when an industry is being organized, is incompatible with full democracy and may ultimately result in distorted representation. Faced with this problem in a recent case, a court refused to enforce an N. L. R. B. order requiring an employer to recognize the United Shoe Workers of America, because subsequent to the initial discrimination ninety per cent of the employees had joined the rival Boot and Shoe Workers Union. The court said: "... the employees have a right to change their choice, and when that fact has been brought sharply to the attention of the Board, as in this case, it was, we think, the duty of the Board to investigate the claim."<sup>117</sup>

A closely related problem arises when representation changes come about not through amorphous transfers of individuals between local unions, but rather by well defined shifts of entire locals, *en bloc*, from one parent organization to another.<sup>118</sup> The allocation of contract rights under these circumstances becomes a matter of subtlety, depending largely upon which of the alternative legal theories of the collective agreement is adopted. Adherence to the atomistic third party beneficiary theory leads to the conclusion that rights in the contract would not become the exclusive property of the seceding union unless every member of the originally contracting

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<sup>116</sup> N. L. R. B. v. Biles Coleman Lumber Co., 96 Fed. (2d) 197 (1938); N. L. R. B. v. Remington Rand, 94 Fed. (2d) 862 (1938); I. A. M. v. N. L. R. B., 105 Fed. (2d) 652 (1939).

<sup>117</sup> Hamilton-Brown Shoe Co. v. N. L. R. B., 104 Fed. (2d) 49 (1939). Similar decisions were rendered in N. L. R. B. v. National Licorice Co., 104 Fed. (2d) 655 (1939); N. L. R. B. v. American Manufacturing Co., 106 Fed. (2d) 61 (1939).

<sup>118</sup> With regard to the property of locals in general, "If the local joins a rival union, the property may be retained by the parent or by the minority continuing the local. But if there is a split in the parent organization and the local adheres to one faction, it will probably be permitted to retain its property as against the claim of the other faction."

"If [funds] were collected for general association purposes . . . or for the purposes of a local as affiliated with the parent, they will usually be awarded to the parent or to the loyal remnant of the local, and the majority of the local membership will not be allowed to withdraw them or transfer them to a rival organization." 47 *Yale Law Journal* 483 (1938).

local assented to the change.<sup>119</sup> The application of ordinary principles of contract might result in divers conclusions, depending upon whether the agreement is viewed as one between the employer and a majority of his employees, or between the employer and the local union as such. In the first approach, followed by the N. L. R. B. and a few courts,<sup>120</sup> contractual rights either pass with the majority to the new parent or, at worst, are terminated altogether. This solution has the advantage of minimizing industrial strife, in that the contrary view might entail the enforcement of an agreement "with a decimated union and require(s) the discharge of a complete staff . . . ."<sup>121</sup> Most courts, however, consider the contract the property of the local union as an entity, to be disposed of only in conformance with the constitution of the parent organization. Thus, unless the local effects a constitutional termination of its life, a task often difficult of achievement in view of the usual provision that a few members may keep the charter alive, collective agreements remain in effect between the abandoned local and the employer.<sup>122</sup>

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<sup>119</sup> *Cassetana v. Filling Station Operators Union*, Super. Ct., Cal., 1 Labor Relations Reporter No. 19 (1938). In this case the original local, an A. F. L. affiliate, lapsed into a moribund state upon the withdrawal of a large majority of its members and the consequent establishment of a rival C. I. O. affiliate. The A. F. L. parent, however, reformed the local under a new name, based upon a loyal minority. In a suit growing out of the clashing interests of the two unions, the court held that both the new locals were successors to the old one and that therefore picketing by members of the new C. I. O. union who had been discharged for refusing to join the A. F. L. local could not be restrained, since their contractual status made such picketing lawful. For a good statement to the contrary, see *M. & M. Woodworking Co. v. Plywood and Veneer Workers Union*, 23 F. Supp. 11 (1938).

<sup>120</sup> *Mc Nulty v. National Mediation Board*, 18 F. Supp. 494 (1936); *World Trading Co. v. Kolchin*, 166 Misc. 854 (1938).

<sup>121</sup> "Effect of Employees' Change of Union Affiliation Upon a Closed Shop Contract," 48 *Yale Law Journal* 1053 (1939). See also Leon M. Despres, "The Collective Agreement for the Union Shop," 7 *University of Chicago Law Review* 24 (1939).

<sup>122</sup> *M & M Woodworking Co. v. Plywood & Veneer Workers Union*, 23 F. Supp. 11 (1938); *M & M Woodworking Co. v. N. L. R. B.*, 101 Fed. (2d) 938 (1939); *Mason Manufacturing Co. v. United Furniture Workers*, 2 Labor Relations Reporter 838 (Cal. Super. 1938); *Pennsylvania Labor Relations Board v. Red Star Shoe Repairing Co.*, C. C. H. par. 18,066 (Pa. 1938). See also the recent cases of *Harris v. Backman*, 86 Pac. (2d) 456 (Ore. 1939); *Lumber and Sawmill Workers v. International Woodworkers of America*, 85 Pac. (2d) 1099 (Wash. 1938); *Lumber and Sawmill Workers v. Cairns*, 85 Pac. (2d) 1109 (Wash. 1938); *Plywood and Veneer Workers Local v. Taylor*, 85 Pac. (2d) 1116 (Wash. 1938).

Labor boards are thus placed in the unenviable position of having to decide charges of unfair labor practices raised against employers unable to comply with the terms of subsisting contracts and bargain with seceding majorities at the same time, and of being obliged to reconcile the conflicting aims of Sections 1 and 9(a) of the statute.<sup>123</sup> If, under these circumstances, discharge pursuant to a closed shop contract is upheld as a legitimate labor practice, the displaced employees cease to be "employees"<sup>124</sup> for the purposes of the Act, they are debarred from further complaint under the Act, and their union is effectively thwarted in its efforts to gain a foothold. If, on the other hand, discharge for non-membership in the minority union is held violative of Section 8(3), a validly contracted agreement must be declared illegal.<sup>125</sup> Neither outcome can possibly prove palatable to all the parties concerned.

*"Labor Dispute" Under the Labor Relations Act*—A complainant seeking immunity from the duties imposed by the National Labor Relations Act urged that controversies in which the employer is faultless (and, presumably, rival union disputes come under this category) do not constitute labor disputes within the meaning of the Act, and that, therefore, a person detached from his employment

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<sup>123</sup> Conflicting, that is, insofar as strict adherence to the letter of 9(a) is not conducive, in rival union situations, to the stabilization sought in Section 1. See Report of Committee on Education and Labor, 74th Congress, 1st Session, Report No. 573, U. S. Senate, p. 12 and *passim*; Report of the Committee on Labor, 74th Congress, 1st Session, H. R. Report No. 1147, p. 20 and *passim*.

<sup>124</sup> For elaboration of the meaning of the statutory term "employee," see the following cases: *N. L. R. B. v. Columbian Enameling & Stamping Co.*, 306 U. S. 292 (1939); *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939); *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 87 Fed. (2d) 611, 92 Fed. (2d) 761, *rev'd*, 304 U. S. 333 (1938); *Black Diamond Steamship Co. v. N. L. R. B.*, 94 Fed. (2d) 875 (1937); *N. L. R. B. v. Carlisle Lumber Co.*, 94 Fed. (2d) 138 (1937), 99 Fed. (2d) 533 (1938); *Jeffery-De Witt Insulator Co. v. N. L. R. B.*, 91 Fed. (2d) 134 (1938); *Mooresville Cotton Mills v. N. L. R. B.*, 94 Fed. (2d) 61 (1938); *Standard Lime & Stone Co. v. N. L. R. B.*, 97 Fed. (2d) 531 (1938); *N. L. R. B. v. Biles Coleman Lumber Co.*, 98 Fed. (2d) 18 (1938); *N. L. R. B. v. National Motor Bearing Co.*, 105 Fed. (2d) 652 (1939); *Metropolitan Life Insurance Co v. State Labor Relations Board*, 280 N. Y. 194, 20 N. E. (2d) 390 (1939).

<sup>125</sup> The unfortunate results of the latter alternative are apparent. Mutuality of obligation, an essential element in contract, would be lacking if a majority of the workers could at any time, by forswearing allegiance to their union, terminate their obligations.

as a result of such controversy is not an "employee" entitled to the statutory rights and privileges.<sup>126</sup> This claim was unceremoniously laid to rest at its very inception by the Supreme Court of the United States:

The argument confuses a current labor dispute with an unfair labor practice defined in Section 8 of the Act. True there is no evidence that respondent had been guilty of any unfair labor practice prior to the strike but within the intent of the Act there was an existing labor dispute in connection with which the strike was called . . . . The wisdom or unwisdom of the men, their justification or lack of it . . . cannot determine whether, when they struck, they did so as a consequence or in connection with a current labor dispute.<sup>127</sup>

*The Closed Shop*—The closed shop has been discussed above, and it is only necessary to add a few remarks concerning the effects of the various statutes. Section 2 of the Norris Act and Section 8(3) of the National Labor Relations Act prohibit coercion of employees. These provisions have been construed as outlawing the closed shop contract,<sup>128</sup> or more commonly, as prohibiting the consummation of this type of agreement with organizations representing less than a majority of the employees.<sup>129</sup> There seems to be little doubt as to the validity of the closed shop contract negotiated pursuant to the terms of the Labor Act,<sup>130</sup> subject to jurisdictional exceptions noted in the preceding chapter.

*Termination of a Labor Dispute*—Determination of the exact duration of a labor dispute under the National Labor Relations Act often becomes a matter of great importance both for the employer and for a labor union seeking new contracts. Strikers remain "employees" for the purposes of the Act,<sup>131</sup> and an employer who re-

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<sup>126</sup> N. L. R. B. v. Mackay Radio & Tel. Co., 87 Fed. (2d) 611.

<sup>127</sup> N. L. R. B. v. Mackay Radio & Tel. Co., 304 U. S. 333 (1938).

<sup>128</sup> N. L. R. B. v. Mackay Radio & Tel. Co., 87 Fed. (2d) 611, reversed 304 U. S. 333 (1938).

<sup>129</sup> M & M. Woodworking Co. v. Plywood & Veneer Workers Union, 23 F. Supp. 11 (1938); Tobin v. Shapiro, 2 Labor Relations Reporter No. 6 (Pa. 1938); Eastwood-Neally Corp. v. International Association of Machinists, 1 Atl. (2d) 477 (N. J. 1938).

<sup>130</sup> Oberman & Co. v. United Garment Workers, 21 F. Supp. 20 (1937); Pennsylvania Labor Relations Board v. Red Star Shoe Repairing Co., C. C. H. par. 18,066 (Pa. 1938); United Shoe Workers v. Wisconsin Labor Relations Board, 279 N. W. 37 (1937); Williams v. Quill, 277 N. Y. 1, cert. den., 303 U. S. 621 (1938).

<sup>131</sup> However, a striker who obtains equivalent employment elsewhere ceases to be an employee, and as to him the labor dispute is terminated. Mooresville Cotton Mills v. N. L. R. B., 97 Fed. (2d) 959 (1938).

fuses to bargain with them may be committing an unfair labor practice.<sup>132</sup> The contention, however, that the status of "employee" is held *in perpetuo*, thus barring an employer from seeking to contract with a new union, at least for a substantial period of time, is incompatible with the ultimate purposes of the Act. Consequently, the courts have ruled that the duty of an innocent employer, i. e., one whose employees are not unemployed because of any unfair labor practice, to continue to treat with the original employees is a question of fact to be decided with reference to such factors as the "length of time involved in the negotiations, their frequency, and the persistence with which the employer offers opportunity for agreement."<sup>133</sup> When the statutory labor dispute has terminated, the employer may contract with a rival union, fully immune from charges of unfair labor practices arising out of that particular controversy.<sup>134</sup>

#### *Employer Interference in Rival Union Situations—*

"... the position of the employer is a most delicate one. Surely, he has the right to his views. And the right to entertain views is rather valueless if it be not accompanied by the right to express them . . . . And yet, the voice of authority may, by tone inflection, as well as by the substance of the words uttered, provoke fear and awe quite as readily as it may bespeak fatherly advice."<sup>135</sup>

The employer must refrain from actively favoring any labor organization.<sup>136</sup> The recipient of favors may be disestablished as a

<sup>132</sup> *Black Diamond S. S. Co. v. N. L. R. B.*, 94 Fed. (2d) 875 (1937).

<sup>133</sup> *N. L. R. B. v. Sands Manufacturing Co.*, 96 Fed. (2d) 721, *aff'd*, 306 U. S. 332 (1939). Accord: *Jeffery-De Witt Insulator Co. v. N. L. R. B.*, 91 Fed. (2d) 134 (1937); *N. L. R. B. v. Lion Shoe Co.*, 97 Fed. (2d) 448 (1938).

<sup>134</sup> In *N. L. R. B. v. Sands Manufacturing Co.*, 306 U. S. 332 (1939), it was held that employees, by violating their contracts, had terminated their employee status. "If, as we have held, the respondent was confronted with a concerted refusal on the part of MESA to permit its members to perform their contract there was nothing unlawful in the company's attempting to procure others to fill their places. If the respondent was at liberty to hire new employees it was equally at liberty to make a contract with a union for their services." Accord: *N. L. R. B. v. Columbian Enameling & Stamping Co.*, 306 U. S. 292 (1939). See Comment, 33 *Illinois Law Review* 343 (1939); 48 *Yale Law Journal* 1422 (1939); 122 *American Law Reports* 1292 (1939).

<sup>135</sup> *N. L. R. B. v. The Falk Corp.*, 102 Fed. (2d) 383 (1939). See also *N. L. R. B. v. Union Pacific Stages*, 99 Fed. (2d) 153 (1938).

<sup>136</sup> However, "Where two independent labor organizations seek recognition it cannot be said to be an unfair labor practice for the employer merely

collective bargaining agency, and any contract entered into with it voided.<sup>137</sup> But it is often difficult to draw the line between legal and illegal employer intervention. There is no unlawful interference, for instance, where an employer accords the majority union the use of plant facilities, pursuant to an agreement,<sup>138</sup> but the same act might be discriminatory if the majority status of the union were contested by a rival organization.<sup>139</sup>

The employer is not permanently debarred from bargaining with a union after having been ordered to cease encouraging membership in it. Lapse of time has the effect of purging the favored union, and it may become the exclusive agent of the employees upon the dissipation of the effects of the employer's assistance.<sup>140</sup>

*Review of Electoral Procedure*—In several cases, circuit courts assumed jurisdiction over the conduct of N. L. R. B. elections. The International Brotherhood of Electrical Workers succeeded in over-

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to express preference of one organization over the other, by reason of the former's announced policies, in the absence of any attempt at intimidation or coercion." *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197 (1938). See Chester C. Ward, "'Discrimination' Under the National Labor Relations Act," 48 *Yale Law Journal* 1152 (1939).

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<sup>137</sup> Disestablishment has been defined as "requiring the company not to recognize, support or encourage the further existence of this particular independent union for any purpose or in any manner." *Cudahy Packing Co. v. N. L. R. B.* 102 Fed. (2d) 745 (1939). Also *Titan Metal Mfg. Co. v. N. L. R. B.*, 106 Fed. (2d) 254 (1939); *N. L. R. B. v. National Motor Bearing Co.*, 105 Fed. (2d) 652 (1939). Cf., *Jefferson Electric Co. v. N. L. R. B.*, 102 Fed. (2d) 949 (1939).

<sup>138</sup> A Board order commanding an employer to cease and desist from granting ship passes to a union and not to its rival was refused enforcement on the ground that there was no discrimination, since the allegedly discriminatory grant was made in accordance with an agreement which permitted the contracting union to board ship for the purpose of collecting dues only, and since neither union was granted the privilege of coming aboard to solicit new members. *Waterman Steamship Co. v. N. L. R. B.*, 103 Fed. (2d) 157 (1939).

<sup>139</sup> "It may be permissible for an employer merely to express a preference between two unions otherwise contending freely for position as bargaining representative, although this has obvious dangers and limitations and the final authority has not so held. But he cannot go further and lend a hand, openly or covertly, to one of the contestants. The basic policy of the Act is 'hands-off' so far as he is concerned." *International Association of Machinists v. N. L. R. B.*, C. C. H. par. 18,477 (1939).

<sup>140</sup> *N. L. R. B. v. Pacific Greyhound Co.*, 106 Fed. (2d) 867 (1939).

turning an order for a "run-off" election,<sup>141</sup> only to be rebuffed by the Supreme Court on the ground that the Board's order did not constitute a reviewable proceeding.<sup>142</sup> A similar fate befell the attempt of a Circuit Court of Appeals to attach to another electoral order the condition that a designated union be named on the ballot.<sup>143</sup> All future moves in this direction are apparently forestalled by Mr. Justice Black's plain words in the *Falk* case: "The court has no right to review a proposed election and in effect to supervise the manner in which it shall thereafter be conducted."<sup>144</sup>

*Minority Union Status*—Employers are under the negative duty to refrain from bargaining with any but the majority representative of their employees, where there is such a representative, in respect of "pay, wages, hours of employment, or other conditions of employment." The U. S. Supreme Court has indicated, however, that this does not preclude "'such individual contracts' as the company might 'elect to make directly with individual employees',"<sup>145</sup> making it possible, perhaps, for each member of a minority union, acting for himself, to contract individually with the employer and achieve a result similar to that which would obtain had the minority union itself signed the agreement in a jurisdiction where an agency or third party beneficiary theory of collective agreements prevailed. But the employer may not deal directly with the minority union, except in matters relating to the presentation and discussion of grievances.<sup>146</sup>

The atmosphere of the labor relations acts is not congenial to the foundation and growth of more than one bargaining agency in each unit. The sole privilege specifically reserved to minorities, that of presenting grievances, is hardly sufficient sustenance for a labor

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<sup>141</sup> *International Brotherhood of Electrical Workers v. N. L. R. B.*, 105 Fed. (2d) 598 (1939).

<sup>142</sup> *International Brotherhood of Electrical Workers v. N. L. R. B.*, 60 S. Ct. 309 (1940).

<sup>143</sup> *N. L. R. B. v. The Falk Corp.*, 102 Fed. (2d) 383 (1939).

<sup>144</sup> *N. L. R. B. v. The Falk Corp.*, 60 S. Ct. 307 (1940).

<sup>145</sup> *N. L. R. B. v. Jones & Laughlin Steel Co.*, 301 U. S. 1 (1937). Accord: *Metropolitan Life Insurance Co. v. State Labor Relations Board*, 280 N. Y. 194, 20 N. E. (2d) 390 (1939).

<sup>146</sup> *N. L. R. B. v. Jones & Laughlin Steel Co.*, 301 U. S. 1 (1937). Exactly what is included under "grievances," however, has not been determined.

organization engaged in an exhausting struggle with a dominant rival. The question of whether so attenuated a status granted to dissident employees takes adequate cognizance of dualism in trade union structure will be postponed until the Board decisions have been reviewed.

#### D. ANTI-INJUNCTION AND LABOR RELATIONS ACTS

The inevitable consequence of the introduction, within half a decade of one another, of two radical and overlapping pieces of legislation, has been the failure to achieve a perfectly integrated and interwoven code of labor law. Court decisions have assumed a dichotomous aspect, followed by not always successful attempts at synthesis. Some of the troublesome contiguities have a direct bearing upon the law of rival unionism, and are among the most vexing problems facing the courts.

Returning again to the all-important "labor dispute" definition, the question has arisen as to whether a minority-employer controversy, clearly within the aegis of the anti-injunction statutes in all other respects, retains its statutory existence subsequent either to the inception of satisfactory bargaining relationships between a proper majority group of employees and the employer, or to the assumption of jurisdiction and promulgation of administrative order by the appropriate labor board acting under the authority of the labor relations act. A few courts have held that no labor dispute exists under these circumstances. The leading case in support of this view was predicated upon the theory that the employer was outside the quarrel, since "there was only one issue over which there was any question or controversy whatever, and that was, who was to be the representative of plaintiff's employees for the purposes of collective bargaining . . . and this issue in the last analysis was one between the C. I. O. and the American Federation of Labor . . . . The unions are the 'disputants' and as to this dispute they do not now stand in 'proximate' or any other relation to the plaintiffs or their employees within the meaning of the Wagner Act."<sup>147</sup> Another judge believed that there could be no controversy, "since the National Labor

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<sup>147</sup> *Retail Food Clerks Union v. Union Premier Food Stores*, 98 Fed. (2d) 821 (1938), *rev'd.*, cause mooted, U. S. Supreme Court (1940). For criticism of this ruling, see 7 *I. J. A. Bulletin* 25 (1939).

Relations Board has settled the only controversy in the case . . . ,"<sup>148</sup> while a third based his conclusion upon deceiving "common-sense" generality that failed to lock horns with the central issue.<sup>149</sup>

Prevailing opinion, however, runs to the contrary. (1) Judge Otis has pointed out that to interpret the definition of a "labor dispute" in the manner suggested above is to redefine it to read as follows: "A labor dispute is a controversy concerning 'rates of pay, wages, hours of employment, or other conditions of employment' only if the controversy is between an employer and the representatives selected by the majority of the employees, provided the employees have organized and selected representatives for collective bargaining."<sup>150</sup> (2) That construction perforce makes a distinction between a "labor dispute" under the Norris Act and one under the Wagner Act, or else the Labor Board under the latter might have no jurisdiction to settle a controversy concerning the representation of employees that has been declared not to be a "labor dispute" under the former.<sup>151</sup> (3) If the appropriate labor board has not yet certified the majority organization, a court which granted an injunction against alleged minority interference would, in effect, make a partial determination of a matter that is within the exclusive jurisdiction of the Board by inhibiting the organizational activities of one of the contesting unions.<sup>152</sup> (4) A minority-employer-majority dispute

may be said to be between one or more employees or association of employees and one or more employees or association of employees. It may also be said to involve a conflicting or competing interest in a labor dispute if that dispute be defined as one against which relief is sought because it is

<sup>148</sup> *Oberman & Co. v. United Garment Workers*, 21 F. Supp. 20 (1937).

<sup>149</sup> *Stalban v. Freedman*, 11 N. Y. S. (2d) 343 (1939).

<sup>150</sup> *Donnelly Garment Co. v. I. L. G. W. U.*, 21 F. Supp. 807 (1937), dissent of Judge Otis.

<sup>151</sup> *Retail Food Clerks Union v. Union Premier Food Stores*, 98 Fed. (2d) 821 (1938), dissent of Judge Biggs.

<sup>152</sup> *Sharp & Dohme Inc. v. Storage Warehouse Employees Union*, 24 F. Supp. 701 (1938); *Donnelly Garment Co. v. I. L. G. W. U.*, 23 F. Supp. 998 (1938); *Fur Workers Union v. Fur Workers Union*, 105 Fed. (2d) 1, *aff'd.*, 60 S. Ct. 292 (1939). See also Note, 39 *Columbia Law Review* 519 (1939).

This is exactly what was done by a federal court in a recent case when a union was enjoined from representing that the employer was unfair to organized labor on the ground that it had not proven its majority and was therefore not entitled to demand exclusive bargaining privileges. *Pauly Jail Building Co. v. International Association of Bridge Workers*, 29 F. Supp. 15 (1939).

engaged in the same industry, trade, craft or occupation in which the dispute occurs. It cannot be said that the respondents do not have an indirect interest therein . . . . It may also be said to be a controversy concerning terms or conditions of employment . . . It also may be said to be a controversy concerning the association or representation of persons . . . .<sup>153</sup>

(5) The theory assumes that Congress did not intend in the combined Norris-La Guardia and Labor Relations Act that in all cases injunctions against labor unions in contests with other unions or with some employer in the same industry should be preceded by compliance with the conditions laid down in the Norris-La Guardia Act, if the union against which the injunction was sought is doing that which the law forbids (as dynamiting a factory or inducing someone to break a contract). That assumption is squarely against both the spirit and letter of the law. Indeed, the only injunctions which the Norris-La Guardia Act does allow are those against unlawful acts.<sup>154</sup>

(6) The dispute may merely involve conditions of employment, and may be adjusted without recognition of or collective bargaining with the minority union.<sup>155</sup> (7) ". . . the pressure may be deemed directed not toward making the employer do what he is forbidden to do, but toward persuading his employees to do what they are free to do, i. e., change their affiliation."<sup>156</sup> Other arguments may be found in the cases appended hereto.<sup>157</sup>

Upon less legalistic grounds, it is apparent that no amount of defining can whisk away a picket line.<sup>158</sup> A real controversy exists, and the courts must decide on economic grounds, as indeed they do, whether or not it is their duty to interfere, in the light of prevailing public opinion. To refuse is to subject the employer to continued coercion. To assume jurisdiction through the denial of a "labor dispute," and to enjoin minority picketing, may have the effect of freezing a situation into undesirable molds by preventing the shifting of workers from one union to another. This may be desirable

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<sup>153</sup> *Houston & North Texas Motor Freight Lines v. International Brotherhood of Teamsters*, 24 F. Supp. 619 (1938). See, 48 *Yale Law Journal* 1053 (1939); 5 *University of Chicago Law Review* 514 (1938); 53 *Harvard Law Review* 301 (1939).

<sup>154</sup> *Donnelly Garment Co. v. I. L. G. W. U.*, 21 F. Supp. 807, dissent of Judge Otis.

<sup>155</sup> 33 *Illinois Law Review* 717 (1939); 39 *Columbia Law Review* 519 (1939).

<sup>156</sup> 16 *N. Y. U. Law Quarterly* 306 (1939).

<sup>157</sup> *Cupples Co. v. A. F. of L.*, 20 F. Supp. 894 (1937); *Grace Co. v. Williams*, 96 Fed. (2d) 478 (1937); *Crawford Clothes v. Frankel*, N. Y. County Clerk Index 19,663 (1937).

<sup>158</sup> Leroy A. Brown, "Labor Dispute," 11 *Southern California Law Review* 484 (1938).

when employees are enjoying the maximum benefits under their present organization, but it is doubtful whether determination of the aims and possible achievements of picketing usurpers should vest in inexperienced judges. It is apparent that Congress has not yet chosen between the various alternatives, although several of the state legislatures have, and until the public policy has been further clarified it would appear appropriate for the courts to recognize that at present their role in the economic conflicts involved in industrial relations is intended to be severely limited and non-discretionary.

If it is concluded that a minority strike against the employer after the Board has intervened creates a "labor dispute," does the anti-injunction act effectively prevent an employer from securing any relief? The National Labor Relations Act provides that the Norris Act shall not limit the equity jurisdiction of the courts when engaged in enforcing a Board order, but makes no other exception. It has been suggested, however, that "the law which stands behind the [N. L. R. B.] in enforcing its judgments will and must stand behind it in reaching those judgments. This means that nothing in the Norris Act can be construed to prevent a Court from exercising its Equity powers to prevent interference with the Labor Board in exercising its functions."<sup>159</sup>

Against this construction is marshalled the thesis that, because of the express reference to the Norris Act contained in the National Labor Relations Act, "the inference is (and such is the effect of the canon of construction, 'expressio unius,' etc.) that this is the only respect in which the Norris-La Guardia Act has been affected by the passage of the Labor Relations Act."<sup>160</sup> And, on broader grounds, it may be contended that the spirit of the Wagner Act would tend to preclude any interpretation which tended to curtail the rights of labor.<sup>161</sup>

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<sup>159</sup> *Union Premier Food Stores v. Retail Food Clerks Union*, U. S. D. C., C. C. H. par. 18,170, *aff'd.* on other grounds, 98 Fed. (2d) 821 (1938). *Accord:* *Oberman & Co. v. United Garment Workers*, 21 F. Supp. 20 (1937).

<sup>160</sup> *Donnelly Garment Co. v. I. L. G. W. U.*, 21 F. Supp. 807 (1937), dissent of Judge Otis.

<sup>161</sup> *Houston & North Texas Motor Freight Lines v. International Brotherhood of Teamsters*, 24 F. Supp. 619 (1938).

Even though subject to the Norris Act, the employer or rival union can secure an injunction against acts not thereby rendered unrestrainable by complying with the conditions precedent to the granting of an injunction. Regarding the negotiation and arbitration required by Section 8, the suggestion has been advanced that "the later establishment of these obligations by the [Wagner] act operated to create an exception to the general provisions of the Norris-La Guardia Act, with the result that employers by reason of the recently established obligation to deal with one entity and one alone were necessarily not required to deal or negotiate with any other,"<sup>162</sup> particularly in view of the fact that the controversy is properly a matter for the appropriate labor board, and not one for a board of arbitration or mediation. It appears likely that other prerequisites will be waived as well, in order to protect the employer left economically vulnerable by compliance with the terms of the Labor Relations Act.<sup>163</sup>

#### E. RELATED FEDERAL LEGISLATION

At least brief reference should be made to the labor provisions of specialized railway and bankruptcy legislation. The Railway Labor Act of 1926 and subsequent amendments<sup>164</sup> guarantee to railroad employees the rights of self organization and collective bargaining, and establish the National Mediation Board to certify the proper bargaining agency. Railroad labor unions have successfully invoked

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<sup>162</sup> *The Grace Company v. Williams*, 20 F. Supp. 263 (1937); *Donnelly Garment Co. v. I. L. G. W. U.*, 99 Fed. (2d) 309 (1938). In the latter case, however, Judge Thomas, in a vigorous dissent, said: "The majority opinion, it seems to me, holds that the pleading of facts which in the opinion of the court, if proven, make it unreasonable for a plaintiff to settle on account of a contract voluntarily entered into after the commencement of the dispute is somehow equivalent to an allegation that every reasonable effort to settle has been made. This seems to me to be an assumption of jurisdiction to determine a fact which the court has no power to determine. Such a result, in my opinion, not only amends but emasculates the statute."

<sup>163</sup> But see "The Labor Injunction Under the NLRA," 8 *I. J. A. Bulletin* No. 5 (1939), for an expression of strong opposition to any mitigation of the conditions precedent to the granting of an injunction under the Act.

<sup>164</sup> C. 347, Secs. 1-14, 201-208, 44 Stat. 577-587; amended, June 7, 1934, c. 426, 48 Stat. 926; June 21, 1934 c. 691, Secs. 1-8, 48 Stat. 1185-1197; April 10, 1936, c. 166, 49 Stat. 1189.

the aid of courts of equity in securing positive enforcement<sup>165</sup> and negative restraint of interference with these rights.<sup>166</sup> The exclusive authority of the Mediation Board to decide questions concerning representation between rival railway unions, even upon the basis of a plurality of votes cast in an election,<sup>167</sup> has been upheld.<sup>168</sup>

The labor provisions of the Federal Bankruptcy Act<sup>169</sup> have been reviewed by the courts in a few instances. In one case, the Act was held not to limit the power of the court "to preserve or protect property under its jurisdiction from destruction where a difference or dispute between labor organizations existed . . . it is reasonable to conclude that if Congress intended to curtail the bankruptcy power where the threatened destruction of property within its jurisdiction was related to a labor dispute, it would have said so."<sup>170</sup> Elsewhere, the motion of a union to compel a receiver to recognize it, and not a rival union, as the exclusive agency for collective bargain-

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<sup>165</sup> *Virginia Railway Co. v. System Federation No. 40*, 300 U. S. 515 (1937); *McNulty v. National Mediation Board*, 18 F. Supp. 494 (1936); *Myers v. Louisiana and Arkansas Rwy. Co.*, 7 F. Supp. 92 (1933).

<sup>166</sup> *Texas & New Orleans R. R. v. Brotherhood of Railway Clerks*, 281 U. S. 548 (1929).

<sup>167</sup> *Association of Clerical Employees v. Brotherhood of Railway Clerks*, 85 Fed. (2d) 152 (1936); *Virginia Rwy. Co. v. System Federation No. 40*, 300 U. S. 515 (1937).

<sup>168</sup> *Brotherhood of Locomotive Fireman v. Kenan*, 87 Fed. (2d) 651 (1937); *Cole v. Atlanta Terminal Co.*, 15 F. Supp. 131 (1936); *Nashville, Chat. & St. Louis Rwy. v. Railway Employees Dept., A. F. L.*, 93 Fed. (2d) 340 (1937); *Railway Employees Cooperative Association v. Atlanta B. & C. R. Co.*, 22 F. Supp. 510 (1938). The Mediation Board has been warned, however, that the statute "neither authorizes nor encourages nor commands the type of gerrymandering that must inevitably follow the enforcement of a certification which ignores the basic facts of historical development, similarity of employment, community of interest, and well-defined group choice." *Brotherhood of Railway Clerks v. St. Louis Rwy. Co.*, 94 Fed. (2d) 97 (1937).

<sup>169</sup> July 1, 1898, c. 541, par. 77B, as added June 7, 1934, c. 424, par. 1, 48 Stat. 912; as amended August 20, 1935, c. 577, 49 Stat. 664; c. 809, 49 Stat. 965, 11 U. S. C. 207. The pertinent provisions, Sec. 272, read: "The right of employees or of persons seeking employment on the property of a debtor under the jurisdiction of the court to join a labor organization of their choice, or to refuse to join or remain members of a company union, shall be free from interference, restraint, or coercion by the court, a debtor or trustee."

<sup>170</sup> *In re Cleveland & Sandusky Brewing Co.*, 11 F. Supp. 198 (1935).

ing, was denied because of the existence of a valid pre-existing contract with the rival.<sup>171</sup>

The conclusions drawn from the foregoing study of recent legislation will be included in the final chapter. Court decisions alone, however, recount but a part of the campaign for the right to bargain collectively. An engrossing chapter in the history of this struggle has been written by the specialized labor tribunals established to administer legislative assistance to employees. To the work of these bodies, colorful if not always fully authoritative, the next section is devoted.

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<sup>171</sup> *Central Hanover Bank & Trust Co. v. United Traction Co.*, 2 Labor Relations Reporter 1 (U. S. D. C. 1938).

## THE FIRST LABOR BOARDS

Most of the special agencies established by the Congress of the United States or by the legislatures of the several states to deal with industrial relations have been faced with the uncomfortable problems of rival unionism. Their reactions form an interesting body of common law, meriting serious consideration in the light of contemporary preoccupation with the question of governmental policy.

The statutes from which the authority of the labor tribunals stemmed have almost uniformly been silent on the specific subject of inter-union relationships. The task immediately suggested, therefore, is an examination of those portions of the enabling acts which the various boards have deemed germane to rival unionism, and upon which the authority to adjudicate disputes arising from the co-existence of contesting labor organizations has been predicated.

Assuming the satisfactory establishment of competent jurisdiction, it then becomes incumbent to survey the considerations entering into the determination actually to set available machinery in motion. In this connection, it is relevant at the outset to make the general observation that every board was motivated by a persistent purpose—the furtherance of an orderly system of collective bargaining to replace industrial strife.

Following this, there is a perusal of methods of intervention in rival union disputes. Under this head only those avenues of procedure of a quasi-judicial character, together with the refinements necessary for their practical application, will be explored. Arbitration, mediation and conciliation, each topic large enough to merit an entire volume, cannot be discussed here.

The procedure once determined, it is imperative to canvass its repercussions upon the pre-existing rights and duties of the parties to the controversy and its effects upon the continuing validity of relevant institutional behavior.

The logical concluding step should be an evaluation of the success attained by each board in terms of its avowed purposes in intervening. Unfortunately, the material available on this point is at best scanty. The disputes have long ceased, the participants are scattered. The possibility of success in piecing together the true effects of board adjudication upon the outcome of controversies, not always clear even to the immediate protagonists, is as slight as it would be in the attempt to reconstruct the magnitude of a fire by examining next morning's ashes. Only insofar as the success or failure of particular policies is reflected in the further declarations and opinions of the same agency may such conclusions be drawn.

### THE NATIONAL WAR LABOR BOARD

The National War Labor Board was created by presidential proclamation in April, 1918, where its *raison d'être* was stated in the following terms:

The powers, functions and duties of the National War Labor Board shall be: To settle by mediation and conciliation controversies arising between employers and workers in fields of production necessary for the effective conduct of the war, or in other fields of national activity, delays and obstructions in which might, in the opinion of the National Board, affect detrimentally such production . . . and to summon the parties to controversies for hearing and action by the National Board in event of failure to secure settlement by mediation and conciliation.<sup>1</sup>

It is apparent that this grant of blanket authority covered all labor disputes in the given fields of production. Every incentive to active intervention was present, and from the day of its constitution the Board took jurisdiction when it considered such action necessary to maintain a steady flow of war goods. It is true that in its deliberations no case squarely presenting an issue of rivalry between unions occurred. But certain principles which were later to play an important role in rival unionism were developed and discussed at some length.

The Board was limited in its activities by certain canons adopted on March 29, 1918, by the War Labor Conference Board, a group

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<sup>1</sup> Proclamation of President Wilson, April 8, 1918. The full text of the proclamation may be found in the Report of the Secretary of the National War Labor Board for the twelve months ending May 31, 1919.

appointed by the Secretary of Labor. The most significant of these, as far as the present study is concerned, are the following:

The right of workers to organize in trade-unions and to bargain collectively through chosen representatives is recognized and affirmed . . . .

The workers, in the exercise of their right to organize, shall not use coercive measures of any kind to induce persons to join their organizations nor to induce employers to bargain or deal therewith . . . .

In establishments where the union shop exists the same shall continue . . . .

In establishments where union and non-union men and women now work together and the employer meets only with employees or representatives engaged in said establishments, the continuance of such condition shall not be deemed a grievance. This declaration, however, is not intended in any manner to deny the right, or discourage the practice of the formation of labor unions, or the joining of the same by the workers in said establishments.<sup>2</sup>

Mediation and conciliation soon proved insufficient to secure amicable labor relations,<sup>3</sup> and the Board was obliged to assume the duty of rendering judicial awards. Complaints were accepted from employees, unions acting in their behalf,<sup>4</sup> and employers. The general tenor of the complaints may be gathered from the fact that of some 490 awards made, 226 in some way touched upon rights and duties involved in collective bargaining, with such questions as wages, hours and conditions of labor forming the bulk of the remainder.<sup>5</sup>

The definitive determination of collective bargaining representatives was perhaps the chief means relied upon to stimulate negotiations between employers and employees. The mode of arriving at this determination was dependent upon the circumstances in each case. Where the employer had previously entered into trade union agreements, he was required to continue to negotiate with the contracting union.<sup>6</sup> On the other hand, if the employer had not there-

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<sup>2</sup> Bulletin of the Bureau of Labor Statistics, No. 287, December 1921, p. 32.

<sup>3</sup> Richard B. Gregg, "The National War Labor Board," 33 *Harvard Law Review* 39 (1919).

<sup>4</sup> Unions might file complaints only in those shops in which the employer had previously dealt with them.

<sup>5</sup> Bulletin of the Bureau of Labor Statistics, No. 287, December 1921, *passim*.

<sup>6</sup> *In re* Corn Products Refining Co., Case No. 130. Citations to cases of the War Labor Board refer to case numbers in the uncollated dockets.

tofore bargained with any union, he was not required to do so.<sup>7</sup> However, if in the latter contingency lack of representation was likely to lead to controversy, the installation of a works council plan was generally ordered.<sup>8</sup> Under these plans, shop committees were elected by departments, voting separately. The following is a typical election provision:

Said committee shall be elected by the direct vote of the employees. Each employee of any department shall have the privilege of voting for three fellow employees as his or her choice for said committee membership. The three employees receiving the highest number of votes shall be declared elected.<sup>9</sup>

It has been asserted that this and similar plans were "expressly based upon the majority rule."<sup>10</sup> Against this interpretation the contention was advanced that "neither the Bridgeport Munitions plan of organization for collective bargaining nor any other plan devised by the War Labor Board in its cases embodied the concept and practice of majority rule as we know it today with its right of the representatives of the majority to be the exclusive bargaining agency . . . ."<sup>11</sup> The Board did fail to specify the exclusive right of the majority to bargain for all, while on the other hand it affirmed the right of employees to join unions of their choice notwithstanding the fact that such unions were not entitled to represent them in collective bargaining.<sup>12</sup> Moreover, by providing for a general shop committee composed of representatives of each of the elected departmental committees, the way was paved for a sort of

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<sup>7</sup> *In re* Omaha and Council Bluffs Street Railway Co., Case No. 154. In this case, the union, representing 90% of the employees, demanded a closed shop contract. The Board ruled: "He [the employer] declined to accept this contract, and was within his right, under the rules of the board, in doing so. He is not, by the rules of the board, required to deal by contract with the union as a union, and in that sense he is not required to recognize the union."

<sup>8</sup> See, for example, the following cases: *In re* General Electric Co., Case No. 19; *In re* Bethlehem Steel Corporation, Case No. 22; *In re* Smith & Wesson Co., Case No. 273; *In re* Bridgeport Munitions Companies, Case No. 132.

<sup>9</sup> *In re* Bridgeport Munitions Companies, Case No. 132.

<sup>10</sup> *In the Matter of* Houde Engineering Corp., 1 N. L. R. B. (old) 35 (1934).

<sup>11</sup> Lillian Simet, "Majority Rule in Collective Bargaining," (Unpublished manuscript in Columbia University Library, 1936).

<sup>12</sup> *In re* St. Joseph Lead Co., Case No. 16; *In re* New York Consolidated Railroad Co., Case No. 283.

works council plan, in the event that the same faction failed to secure a majority in every department of the plant. The alleged intent of the Board to introduce the majority rule was still further beclouded by the fact that it made specific provision for minority representation by stipulating that "In the elections the examiner shall provide, wherever practicable, for the minority representation by limiting the right of each voter to a vote for less than the total number of the committee to be selected."<sup>13</sup> It seems impossible to escape the conclusion that, whatever the intentions, the plans actually formulated recognized the possibility of divided loyalties among the employees of a single plant and established something less than simple majority representation in collective bargaining.

The pre-existing right of non-union and, presumably, rival-union employees to refrain from joining any union, or a particular union, was emphatically affirmed.<sup>14</sup> The closed shop was not outlawed, however, where it had previously existed.<sup>15</sup> The remainder of the Board's opinions are not pertinent here.<sup>16</sup>

#### THE RAILROAD LABOR BOARD

The Railroad Labor Board was in many ways a pioneer in the field of quasi-judicial adjudication of rival union disputes. Surprisingly little has been done in the way of thorough study of its policies as developed in some four thousand reported decisions. A description of its work should prove of particular interest to those familiar with later developments.

The Board was set up by the Transportation Act of 1920,<sup>17</sup> charged with the duty of hearing "any dispute involving grievances, rules or working conditions . . . if it is of the opinion that the dispute is likely substantially to interrupt commerce."<sup>18</sup> It was con-

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<sup>13</sup> *In re* General Electric Co., Case No. 19; *In re* Smith & Wesson Arms Co., Case No. 273.

<sup>14</sup> See the cases cited by Robert Reeder, *Summary of the Awards of the National War Labor Board* (Mimeographed document in Library of Columbia University, 1919).

<sup>15</sup> *In re* Omaha and Council Bluffs Street Railway, Case No. 154.

<sup>16</sup> For a critical appraisal of all phases of the Board's activity see Gregg, *op. cit* at n. 3.

<sup>17</sup> 41 Stat. 456 (1920).

<sup>18</sup> *Ibid.*, Section 307(a). If Adjustment Boards, as provided in the Act, were established, such disputes were first to be referred to them, and

financed in jurisdiction, of course, to railway labor disputes.<sup>19</sup> There was nothing in the Transportation Act, or in the circumstances surrounding its passage, to indicate special treatment for rival union disputes; nor was the authority of the Board to deal with this particular category, as distinct from other classes of disputes, questioned.

The multiplicity of labor organizations claiming to represent railroad workers made inevitable the submission to the Board of numerous inter-organization quarrels. Since such differences were among the factors most conducive to the impairment of normal operations, the Board never hesitated to assume the obligation of attempting to find satisfactory solutions.<sup>20</sup>

Procedures designed to ascertain the freely chosen representatives of employees were primarily employed. For guidance in certification, the Board resorted to investigation and, where necessary, to secret elections.<sup>21</sup> Disputes might be submitted, and elections requested, by carriers,<sup>22</sup> labor organizations, or groups of not less than one

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to come to the Railroad Labor Board only upon certification of an Adjustment Board that "in its opinion the Adjustment Board has failed or will fail to reach a decision within a reasonable time." If Adjustment Boards were not set up, however, disputes might go directly to the Railroad Labor Board.

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<sup>19</sup> For full details as to organization, duties and activities of the Board, see Wolf, H. D., *The Railroad Labor Board* (Chicago, 1927); Ward, Frank B., *The United States Railroad Labor Board and Railway Labor Disputes* (University of Pennsylvania, 1928). It should be noted that a sharp distinction was made between wage and working condition disputes on the one hand and collective bargaining disputes on the other.

<sup>20</sup> The Board carefully distinguished between true rival union disputes and jurisdictional disputes. In *Brotherhood of Railway Clerks v. Boston & Maine R. R. Co.*, 6 R. L. B. 560, Decision No. 3211 (1925), the Board ruled: "In the opinion of the Railroad Labor Board the question in case is purely a jurisdictional dispute between two organizations which should be adjusted by the disputants. The carrier has agreed to include the positions in whichever agreement the organizations decide is applicable, and in these circumstances the board does not consider that it should be expected to consider or decide the dispute."

<sup>21</sup> The Board based its authority to conduct elections upon Section 308 of the Transportation Act, which provided that "The Labor Board . . . may make regulations necessary for the efficient execution of the functions vested in it by this title." The legal battle successfully waged by the Board in defense of its assumption of the right to conduct elections is described in detail in Wolf, *op. cit.* at n. 19, pp. 297 ff.

<sup>22</sup> Although the Board seems to have taken no definite stand upon the treatment of an election petition submitted by the employer alone, no case was noted in which election was granted solely at an employer's behest.

hundred unorganized employees directly interested in the dispute; or the Board might proceed upon its own motion.

A series of principles was early formulated by the Board for the guidance of petitioners. Rule 15 was particularly pertinent to representation procedure:

The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice.<sup>23</sup>

The selection of an appropriate bargaining unit is a necessary preliminary to the determination of employee representatives.<sup>24</sup> On the railroads the most usual division was the system-wide craft, each being considered autonomous for representation purposes,<sup>25</sup> and the Board manifested a strong reluctance to declare less inclusive groups independent.<sup>26</sup> In a few cases a craft-industrial unit

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<sup>23</sup> *International Association of Machinists v. Atchison, Topeka and Santa Fe R. R.*, 2 R. L. B. 87, Decision No. 119 (1921).

The derivation of this concept is interesting: "It is evident that since the statute provides that the employees interested in the dispute be represented in such a conference by representatives 'designated and authorized' by said employees, it necessarily follows, under our system of government, that a majority of such employees would have the right to designate their representatives." *Railway Employees Dept. v. Pennsylvania System*, 2 R. L. B. 207, Decision No. 218 (1921).

<sup>24</sup> Ordinarily, there is little difficulty in selecting the unit. There may be controversy, however, in three types of situations: (1) where rival employee groups are organized along different lines, *e.g.*, craft and industrial; (2) where the employer, when so permitted, disagrees with a union as to the proper unit; (3) where the deciding board may itself disallow a unit advocated by a union. It is with reference to the first of these that a discussion of unit determination will be included.

<sup>25</sup> *E.g.*, *Railway Employees Dept v. Pennsylvania System*, 2 R. L. B. 207, Decision No. 218 (1921); *Switchmen's Union v. Delaware, Lackawanna & Western R. R.*, 7 R. L. B., Decision No. 4194 (1926).

<sup>26</sup> The lengths to which the Board went to prevent atomistic bargaining units were sometimes rather drastic. For instance, on the D. and L. [*Switchmen's Union v. Delaware, Lackawanna & Western R. R.*, 7 R. L. B., Decision No. 4194 (1926)] the Brotherhood of Railway Trainmen had represented yard service employees in a few shops for a quarter of a century. The rival Switchmen's Union, claiming a majority of yardmen on the line as a whole, petitioned for an election on a line-wide basis. This request was granted, despite the admittedly satisfactory record of the Brotherhood in bargaining for the minority it represented.

In *American Federation of Railroad Workers v. St. Louis Railroad Co.*, 3 R. L. B. 24, Decision No. 618 (1922), the Board ruled: ". . . in view

controversy was raised. The practice of voting each class or craft separately was followed in that event, but where the constituent crafts chose unions affiliated with a common parent, the carrier was required to negotiate with the joint representatives.<sup>27</sup> The chief problem was the disposition of bargaining rights when the elections resulted in the selection of mutually hostile representatives by the several crafts. In a notable case, the Soo Lines Shop Employees Association carried four out of six crafts, the Railway Employees Department of the A. F. of L. the remaining two. The carrier insisted upon certification of one representative for all, declaring that the existing situation made it "a buffer between the two rival organizations."<sup>28</sup> The Board, noting that this was the first such question referred to it, decided that the two A. F. of L. crafts should be permitted to vote again, with the stipulation that if they then evinced the desire to remain apart from the other four crafts, they might do so. Four of the nine members of the Board registered a bitter dissent,<sup>29</sup> largely as a result of which a re-vote was later ordered for the remaining crafts as well.<sup>30</sup>

"Majority" as employed in Rule 15, cited above, was construed to signify a majority of the legal votes cast. For, the Board argued, "The purpose of the Railroad Labor Board was to give all the em-

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of the fact that the American Federation of Railroad Workers does not represent a majority of the carmen on the *entire system* . . . the Labor Board sustains the position of the carrier in refusing to enter into negotiations regarding rules and working conditions . . . with the American Federation of Railroad Workers." [Italics mine]

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<sup>27</sup> *Federated Shop Crafts v. Texas and Pacific Railway*, 2 R. L. B. 157, Decision No. 153 (1921). See also the cases cited by Wolf, *op. cit.* at n. 19, p. 19, footnote 49.

<sup>28</sup> *Railway Employees Dept. v. Minneapolis, St. Paul & Sault Ste. Marie Railway*, 6 R. L. B. 105, Decision No. 2846 (1925).

<sup>29</sup> *Idem.* Mr. A. O. Wharton wrote for the minority: "This decision is without precedent, merit, or justification . . . it rewards the carrier for its persistent refusal to abide by the results of the secret ballot which was taken to determine the question of representation . . . ."

There is no ground for the action of the majority in this case. I know what I am saying, for I have heard the arguments advanced in the executive sessions, and the farcical pretext of impartial dealing with the Federated Shop Crafts in this case is enough to sicken one and destroy any hope of justice and fair dealing."

<sup>30</sup> *Ibid.*, 6 R. L. B. 401, Decision No. 3092 (1925). No definitive conclusion to this general problem was reached in the short remaining life of the Board.

ployees to be affected the privilege of expressing their choice. The Board could not force any employee nor all of the employees to vote. It could only give all a fair opportunity."<sup>31</sup>

Blank ballots were regarded as refusals to vote, and a mark of "X" following a space on the ballot left vacant to give the voter the option of choosing a representative other than those listed was likewise denied the status of a vote cast where the voter failed to designate his choice specifically.<sup>32</sup> Where no one of more than two organizations or individuals received a majority of the legal votes cast, the Board provided for a run-off election between the two competitors receiving the largest number of votes.<sup>33</sup> The organization then securing an accredited majority was formally certified as the exclusive representative of the workers for collective bargaining.

Policy as to the validity of informal balloting in which rival unions were involved was not entirely consistent. In an early case two separate elections conducted by carrier and one of the unions party to the dispute, respectively, were declared void and of no effect.<sup>34</sup> Later, however, the Board upheld an election conducted by a carrier upon the request of a local organization despite the refusal of a rival national union, which had won a formal election two years previously, to participate.<sup>35</sup>

The effect of existing collective agreements upon the reception to be accorded to petitions for election was considered briefly.<sup>36</sup> A contract for a term of one year was held to constitute an effective bar to the holding of an election prior to its expiration date,<sup>37</sup> but

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<sup>31</sup> Brotherhood of Railway Clerks v. Southern Pacific Lines, 4 R. L. B. 625, Decision No. 1971 (1923). In a similar vein: Brotherhood of Railway Clerks v. Kansas City Terminal Railway Co., 4 R. L. B. 730, Decision No. 2019 (1923); Brotherhood of Railway Clerks v. Gulf and Ship Island Railroad Co., 5 R. L. B. 290, Decision No. 2309 (1924).

<sup>32</sup> Brotherhood of Railway Clerks v. Oregon-Washington Railroad, 5 R. L. B. 352, Decision No. 2375 (1924).

<sup>33</sup> Railway Employees Dept. v. Pennsylvania System, 2 R. L. B. 207, Decision No. 218 (1921).

<sup>34</sup> *Idem*.

<sup>35</sup> Brotherhood of Railway Clerks v. Oregon Short Line, 6 R. L. B. 1327, Decision No. 3981 (1925).

<sup>36</sup> It is scarcely necessary to point out the relevance of this subject to a discussion of rival unionism. If an organization is debarred from raising and carrying through representation procedure because of a contract held by its rival, its privileges are, *ipso facto*, substantially curtailed.

<sup>37</sup> Brotherhood of Railway Clerks v. Nashville, Chatanooga & Tennessee Railway, 4 R. L. B. 623, Decision No. 1970 (1923).

an election was ordered where a subsisting contract had already been in effect for over two years, although the Board expressly affirmed the validity of the contract.<sup>38</sup> An agreement negotiated during the course of representation proceedings before the Board was given no effect, such action being considered "irregular and in contempt of the authority of the Board."<sup>39</sup> Finally, it was intimated that a strike carried out by a contracting union had the effect of abrogating all agreements, with the result that such agreements could not be used to estop the conduct of an election.<sup>40</sup>

The weight to be accorded anterior elections was decided on the merits of the individual case. The Board, however, indicated its general attitude in an interesting dictum:

The board is of the opinion that there is no necessity for a representation election unless there is a reasonable presumption that a majority of the employees desire a change . . . . The board does not confirm the contention of the employees that an election once held definitely and for all time settles the question of representation.<sup>41</sup>

When a desire to change representatives was established, the right of employees to do so was upheld in unambiguous terms.<sup>42</sup> The finding of a "reasonable presumption" to this effect was prerequisite to affirmative action upon a petition for election. Where for thirteen months subsequent to an election a carrier refused to sign an agreement with the victorious union, the petition of a rival union was denied on the ground of failure to present an adequate and genuine indication of desire on the part of the employees to change representatives.<sup>43</sup> But expiration of an old agreement and

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<sup>38</sup> *Brotherhood of Railway Clerks v. Central Railroad of New Jersey*, 4 R. L. B. 475, Decision No. 1877 (1923).

<sup>39</sup> *Petition of Gulf Coast Lines for Rehearing*, 4 R. L. B. 629, Decision No. 1972 (1923). Also, *Brotherhood of Railway Clerks v. Nashville, Chattanooga & Tennessee Railway*, 4 R. L. B. 623, Decision No. 1970 (1923).

<sup>40</sup> *Railway Employees Dept. v. Gulf Coast Lines*, 4 R. L. B. 434, Decision No. 1834 (1923).

<sup>41</sup> *Brotherhood of Railway Clerks v. Union Pacific Railroad*, 6 R. L. B. 485, Decision No. 3153 (1925).

<sup>42</sup> "It may be that when the former contract was negotiated the committee which acted for the employees was duly authorized by a majority of such employees. But that is not the question now. The question is: Who is, or are, now the choice of a majority of such employees? As the board has held, at proper times the employees, the parties directly interested, have a clear right to change their representatives." *Petition of Gulf Coast Line for Rehearing*, 4 R. L. B. 629, Decision No. 1972 (1923).

<sup>43</sup> *Brotherhood of Railway Clerks v. Union Pacific Railroad*, 6 R. L. B. 485, Decision No. 3153 (1925).

tentative negotiations looking toward the signing of a new one were held to create a situation in which a re-examination of representation might be expedient.<sup>44</sup> Petition for a change of representation filed on behalf of a majority of employees within a unit one and one-half years subsequent to an election was considered to justify the ordering of a new election.<sup>45</sup> An informal election effecting a change of representation was upheld in spite of the fact that twenty months previously an organization rival to the victor had won an election conducted by the Board itself.<sup>46</sup> A re-election was ordered a few months after a certification because "A misunderstanding arose as to whether or not the result of the ballot would be determined by crafts or in its entirety."<sup>47</sup> However, a petition for a new determination submitted by an organization representing but 5 percent of the employees was denied, since "the evidence presented clearly demonstrates that the employees are not desirous of changing their present form of organization."<sup>48</sup>

The concomitant of the newly devised electoral procedure was the redefinition, by the common-law process, of the rights and duties of affected parties. Perhaps the Board's most important statement bearing upon rival union relationships was Rule 7 in the *Atchison* case:

The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by

<sup>44</sup> Petition of Gulf Coast Lines for Rehearing, 4 R. L. B. 629, Decision No. 1972 (1923).

<sup>45</sup> Southern Pacific Lines v. American Train Dispatchers Association, 5 R. L. B. 571, Decision No. 2512 (1924). A similar conclusion was reached where the first election took place on Oct. 6, 1923, and petition for a second one was filed on May 25, 1925: Brotherhood of Railway Clerks v. Kansas City Southern Railway Co., 6 R. L. B. 1006, Decision No. 3640 (1925).

<sup>46</sup> Brotherhood of Railway Clerks v. Oregon Short Line, 6 R. L. B. 1327, Decision No. 3981 (1925). The original election was held in September 1923. In January 1924, the Clerical Employees Association, a rival of the complainant, petitioned the Board for an election, but its petition was denied. In September 1925, the carrier notified the Brotherhood (complainant) of a request for an election made by its employees, and proceeded itself to conduct one in spite of the refusal of the Brotherhood to participate. The results of this election were recognized by the Board as valid indices of the desires of the employees.

<sup>47</sup> Railway Employees Dept. v. Minneapolis, St. Paul & Sault Ste. Marie Railway, 6 R. L. B. 401, Decision No. 3092 (1925).

<sup>48</sup> Order of Skilled Maintenance of Way Employees v. Chesapeake & Ohio R. R. Co., 6 R. L. B. 1320, Decision No. 3977 (1925). No previous election had been held in this instance.

management. This right of participation shall be deemed adequately complied with if and when the representatives of a majority of the employees of each of the several classes directly affected shall have conferred with the management.<sup>49</sup>

This served as the point of departure for the investiture in majorities of rights and powers strikingly similar, both as to extent and limitation, to parallel rights conferred more generally by subsequent national and state labor legislation. A properly constituted majority was given the exclusive right to make an agreement governing rules and working conditions for the entire class or craft, for member and non-member alike.<sup>50</sup> No minority organization might negotiate changes in such an agreement.<sup>51</sup> On the other hand, no agreement might "infringe upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."<sup>52</sup> Moreover, a minority organization enjoyed the privilege of bringing its grievances to the notice of the Board, notwithstanding the fact that those grievances originated in a contract held by the rival majority. "We may rest assured that Congress did not intend to require an organization to submit to a rival organization questions of conflicting interest between the two."<sup>53</sup> But the Board consistently refused to charge an employer with the duty of bargaining with a minority union, even where no organized majority was in existence.<sup>54</sup>

Another phase of inter-union relationships was covered by Rule 6 of the *Atchison* case:

No discrimination shall be practiced by management as between members and non members of organizations or as between members of different organizations, nor shall members of organizations discriminate against non

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<sup>49</sup> *International Association of Machinists v. Atchison, Topeka & Santa Fe Railroad*, 2 R. L. B. 87, Decision No. 119 (1921).

<sup>50</sup> *Brotherhood of Railway Clerks v. Missouri, Kansas & Texas Railway*, 2 R. L. B. 171, Decision No. 173 (1921); *Railway Employees Dept. v. San Antonio Railway Co.*, 4 R. L. B. 656, Decision No. 1982 (1923).

<sup>51</sup> *International Union of Steam and Operating Engineers v. Baltimore & Ohio R. R.*, 6 R. L. B. 444, Decision No. 3117 (1925).

<sup>52</sup> *Brotherhood of Railway Clerks v. Florida East Coast Railway*, 2 R. L. B. 478, Decision No. 503 (1921).

<sup>53</sup> *Switchmen's Union v. Northern Pacific Railroad*, 6 R. L. B. 474, Decision No. 3147 (1925).

<sup>54</sup> See, for example, *Railroad Yardmasters of America v. Chicago & Northwestern Railroad*, 6 R. L. B. 565, Decision No. 3218 (1925).

members or use other methods than lawful persuasion to secure their membership.<sup>55</sup>

In a relevant case, a member of the Switchmen's Union was discharged in pursuance of an 85 percent preferential shop agreement held by the rival Brotherhood of Railway Trainmen. The Board, after noting that the closed shop had not been recognized on the railroads, decided that the 85 percent clause was discriminatory and unfair, and ordered the reinstatement of the discharged employee, with this admonition: "A railway employee's membership or non-membership in an organization should not be a matter of compulsion. He should not be coerced either by the labor organization or by the carrier in connection with the exercise of his rights to join an organization or to make choice between two rival organizations."<sup>56</sup>

It was held, in connection with the validity of collective agreements, that individual officers of labor organizations acted merely as agents for the membership, and were not authorized to represent the membership, upon withdrawal from the organizations, merely by virtue of their positions as signatories to agreements.<sup>57</sup> Upon this basis, the action of a carrier in abrogating an agreement with a union and signing another with an organization formed by an ex-officer of the original union was condemned.

The Board has been accused of fomenting rivalry because of its attitude toward the standard unions in the shopmen's strike of 1922. In a resolution generally believed to be hasty and ill-advised,<sup>58</sup> it declared that since striking unions no longer represented non-striking employees, "it will be desirable, if not a practical necessity, for the employees of each class on each carrier to form some sort of association or organization to function in the representation of said employees before the Railroad Labor Board."<sup>59</sup> It therefore resolved: "That it be communicated to the carriers and the employees remaining in the service and the new employees suc-

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<sup>55</sup> *International Association of Machinists v. Atchison, Topeka & Santa Fe Railroad*, 2 R. L. B. 87, Decision No. 119 (1921).

<sup>56</sup> *Railway Employees Dept. v. San Antonio Railway Co.*, 4 R. L. B. 656, Decision No. 1982 (1923). The percentage clause would eventually have resulted in the employment of 85% of Switchmen men as a minimum figure.

<sup>57</sup> *United Brotherhood of Maintenance Employees v. Pennsylvania System*, 4 R. L. B. 378, Decision No. 1827 (1923).

<sup>58</sup> Wolf, *op. cit.* at n. 19, p. 265.

<sup>59</sup> 3 R. L. B. 1139 (1922).

ceeding those who have left the service to take steps as soon as practicable to perfect on each carrier such organizations as may be deemed necessary for the purposes above mentioned."<sup>60</sup>

An authoritative account of the effectiveness of the Railroad Labor Board's decisions may be found in Wolf's exhaustive treatise.<sup>61</sup> Suffice it to say here that whatever the shortcomings of the Board, it must at least be credited with a realistic attempt to face the gordian issues raised by rival unionism and with a consistent determination to apply its conception of majority rule to the representation of railroad workers.

### THE BOARD OF MEDIATION

The Board of Mediation, established by the Railway Labor Act of 1926,<sup>62</sup> exercised no quasi-judicial functions<sup>63</sup> with the possible exception of its interpretations of collective agreements reached through the mediatory mechanism of the Act.<sup>64</sup> Its duty "was simply to bring together the parties to a dispute and try to get them to settle, failing which they would be encouraged to resort to arbitration."<sup>65</sup> In only nine disputes were consent elections held.<sup>66</sup> It should be noted, however, that in the performance of its non-judicial functions, rival unionism loomed as a particularly exasperating problem.<sup>66a</sup>

### THE NATIONAL MEDIATION BOARD

The National Mediation Board, created by the 1934 amendments to the Railway Labor Act,<sup>67</sup> inherited to a large extent the policies

<sup>60</sup> *Idem.*

<sup>61</sup> Wolf, *op. cit.* at n. 19, chap. xv.

<sup>62</sup> C. 347, Secs. 1-14, 44 Stat. 577 (1926).

<sup>63</sup> See Lloyd K. Garrison, "The Railroad Adjustment Board," 46 *Yale Law Journal* 567 (1937).

<sup>64</sup> During the eight years of its existence, the Board made eleven such interpretations. See the Annual Report of the United States Board of Mediation for the fiscal year ended June 30, 1934, p. 1.

<sup>65</sup> Garrison, *op. cit.* at n. 63.

<sup>66</sup> Nathan Witt, *Supplement to Landis' Cases on Labor Law* (Chicago, 1937), p. 77, footnote 5, citing testimony of William Leiserson at hearings by the National Labor Relations Board in the case of Jones & Laughlin Steel Corp.

<sup>66a</sup> Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73rd Congress, 2d Session (1934), p. 139, testimony of Chairman Winslow. The mediation and arbitration work of the Board is summarized in its Annual Reports, 1927-1934.

<sup>67</sup> 48 Stat. 1185 (1934).

of its predecessors. The medium of transmission was the revised statute itself, and particularly Section 2(4):

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments or other contributions: Provided, that nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.<sup>68</sup>

The new board was required, under the terms of the statute, to investigate, upon the request of any party to a dispute, questions concerning the representation of employees for the purposes of the Act, and to certify to the carrier the properly qualified representatives. It was authorized to conduct secret elections where necessary, and to establish appropriate rules of procedure.<sup>69</sup>

The Board's jurisdiction over rival union disputes seems unquestionable. Section 2(9) refers to "any" representation dispute. Furthermore, Coordinator Joseph B. Eastman, who was largely responsible for the 1934 amendment,<sup>70</sup> stated, in refutation of a suggested deletion which would have drastically limited the powers of the board,<sup>71</sup> that the electoral procedure was designed to eliminate jurisdictional disputes and to afford "the best possible way of

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<sup>68</sup> *Ibid.*, Sec. 2 (4). The work of the National Railroad Adjustment Board, created by the same statute to help interpret and apply collective agreements, is treated at length in William A. Spencer, "The National Railroad Adjustment Board," *University of Chicago Studies in Business Administration*, vol. XIII, No. 3 (1938).

<sup>69</sup> *Ibid.*, Sec. 2 (9).

<sup>70</sup> See the Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73d Congress, 2d Session (1934), p. 1.

<sup>71</sup> *Ibid.*, p. 65. Mr. M. W. Clement had argued for the elimination of the provisions authorizing the board to investigate and certify.

determining what employees want. It is definite and conclusive, and will put an end to strife which would otherwise continue. So far as jurisdictional disputes are concerned, I agree with Colonel Winslow that they are the curse of the labor-union world, and the more they are dragged out into the open and settled the better."<sup>72</sup>

After a year of operation, the Board indicated that inter-union conflicts were among its most serious problems.<sup>73</sup> During the next two years, there was a tendency for these controversies to decrease in importance, but in 1938 the trend was upward once more.<sup>74</sup>

Figures in support of this conclusion have been compiled by the Mediation Board.<sup>75</sup> Of 452 disputes involving representation disposed of during the first four years of operation, 124 were directly between nationwide labor organizations, 157 concerned a national organization and a system association,<sup>76</sup> 24 were between a national organization and a local union,<sup>77</sup> while in 5 others the issues involved local unions versus system associations. In one case there was conflict between local unions, and in one other between system associations.

Although possessing no power to define the craft jurisdictions of contending organizations,<sup>78</sup> the Board is charged with the duty of selecting appropriate electoral divisions. In the performance of this task it is bound by the provisions of Section 9(2) of the Act, which grants autonomous representation to crafts or classes of employees. As a matter of policy, the Board has followed "the past practice of the employees in grouping themselves for representation purposes and of the carriers in making agreements with such representatives"<sup>79</sup> wherever practicable. Deviation from purely local practice has often proved necessary, however, in the interests of national uni-

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<sup>72</sup> *Ibid.*, p. 151.

<sup>73</sup> First Annual Report of the National Mediation Board, for the fiscal year ended June 30, 1935, p. 18.

<sup>74</sup> Fourth Annual Report of the National Mediation Board, for the fiscal year ended June 30, 1938, pp. 3, 17.

<sup>75</sup> The following information was secured from the first four annual reports of the Board, 1935-1938 inclusive.

<sup>76</sup> A system association is an organization of employees confined to a single railroad company.

<sup>77</sup> A local union is one confined to a single shop on a railroad.

<sup>78</sup> First Annual Report of the National Mediation Board (1935), p. 20; In the Matter of Indiana Harbor Belt Railroad Co., Case No. R-207 (1937).

<sup>79</sup> First Annual Report of the National Mediation Board (1935), p. 18.

formity.<sup>80</sup> Attempting at first to decide craft-line disputes entirely upon the merits of the individual cases presented, the Board found a modification of this viewpoint expedient for, as has been well said in another connection, "a rough doctrine of . . . *res adjudicata* as to units . . . developed if only because the parties desire certainty and themselves argue in terms of prior decisions."<sup>81</sup>

The designation of units was rendered more difficult by the practice engaged in by organizations unwilling to chance defeat in logically large units, of claiming craft autonomy for whatever groups they were certain to carry. The Mediation Board has consistently opposed the unnecessary subdivision of recognized crafts or classes on the theory that the "Railway Labor Act does not authorize the National Mediation Board to certify representatives for small groups of employees arbitrarily selected. Representatives may be designated and authorized only for the whole of a craft or class employed by a carrier."<sup>82</sup>

The electoral function impinges upon one of the sore spots of railroad labor organization—overlapping jurisdictions. Since many of the railroad brotherhoods are unaffiliated organizations recognizing no higher authority, conflicting claims to various crafts partake more of the nature of rival union than jurisdictional disputes. This is borne out by the not infrequent raids in the course of which organizations previously operating in a restricted sphere suddenly lay claim to employees theretofore represented by contiguous organizations. The Board has decried these attempts, pointing out the wisdom of self-limitation to the representation of crafts clearly defined in advance, and stressing the malignant effects of these forays

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<sup>80</sup> The Board has held that "the Railway Labor Act, by Section 3, makes it plain that Congress intended as much national uniformity as possible in the organization of the crafts for the purposes of the Act." In the Matter of Atchison, Topeka & Santa Fe Railway System, Case No. R-406 (1938).

<sup>81</sup> Note, 38 *Columbia Law Review* 1244, 1256 (1938). The Board itself has attested to the correctness of this contention: "After some decisions had been made . . . separating certain groups of employees, insistent demands were made that the board follow the same rulings in subsequent cases, and other groups of employees within a class or craft insisted that they too were entitled to separation as distinct crafts." First Annual Report of the National Mediation Board (1935), p. 21.

<sup>82</sup> In the Matter of the Pennsylvania Railroad, Case No. M-181 (1937), Case No. R-305 (1937).

upon both the labor movement and the operations of the carriers.<sup>83</sup> In formulating decisions, little weight is given to asserted jurisdictional claims.<sup>84</sup>

The rule that a majority of each class or craft should have the exclusive right to represent the employees within that classification for purposes of collective bargaining was adopted as a matter of due course.<sup>85</sup> In its earlier decisions, the Board interpreted "majority" to mean a majority of all those eligible to participate in an election.<sup>86</sup> After a year of experience, however, this was reversed to provide for certification on the basis of a majority of the legal votes cast where a majority of the eligible voters participated in the election.<sup>87</sup> Where neither union receives a majority of the votes cast, or when there is a tie, the electoral petition is dismissed.<sup>88</sup>

The existence of a *bona fide* dispute concerning representation is prerequisite to the assumption of quasi-judicial jurisdiction. The Board has refused to countenance union sorties upon rival strongholds under the guise of representation questions where the aggressor had enrolled but a small minority of the beleaguered constituency,<sup>89</sup> or where it had impliedly recognized the jurisdiction of its rival by assenting to classifications embodied in collective agreements

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<sup>83</sup> Second Annual Report of the National Mediation Board (1936), p. 10.

<sup>84</sup> First Annual Report of the National Mediation Board (1935), p. 18; In the Matter of Indiana Harbor Belt Railroad Co., Case No. R-207 (1937); In the Matter of the New York Central Lines, Case No. R-454 (1938).

<sup>85</sup> In the Matter of the Delaware, Lackawanna & Western R. R. Co., Cases M-199 and R-358 (1937).

<sup>86</sup> First Annual Report of the National Mediation Board (1935), p. 19. In explanation of its departure from preponderant authority, the Board wrote: "The interpretation was made . . . not on the basis of legal opinion and precedents, but on what seemed to the Board best from an administration point of view. Where, however, the parties to a dispute agreed among themselves that they would be bound by a majority of the votes cast, the Board took the position that it would certify on this basis . . . ."

<sup>87</sup> In the Matter of Nashville, Chatanooga & St. Louis Railway Co., Case No. R-170 (1935).

<sup>88</sup> In the Matter of Pennsylvania Reading Seashore Lines, Case No. R-513 (1939); In the Matter of Detroit Terminal Railroad Co., Case No. R-512 (1939).

<sup>89</sup> In the Matter of the Pennsylvania Railroad, Case No. M-151 (1937); In the Matter of Western Pacific Railroad Co., Case No. R-525 (1939); In the Matter of Norfolk & Western Railway Co., Case No. R-506 (1939).

or drawn up for electoral purposes.<sup>90</sup> However, an entrenched union may not plead absence of a technical dispute where the evidence indicates the existence of substantial conflict.<sup>91</sup>

General policy regarding the extent to which election and certification preclude further representation shifts was outlined in the following dictum:

The National Mediation Board conceives its function under the law to be to bring about peace and harmony in the railroad industry, and not, as indicated by the counsel for the Brotherhood, merely to act to hold elections whenever some group of officers of a beaten organization desires to have an election.<sup>92</sup>

In point is a dispute in which the old Board of Mediation had arranged a consent election among the employees of the Boston & Maine Railroad. This was held in July 1934, and won by an American Federation of Labor affiliate over an independent organization. A request for a new election made by the latter to the National Mediation Board was denied, and the carrier ordered to deal with the A. F. of L. organization. After some seven months, however, a new request was submitted, which the Board granted upon the facts, "particularly that some new employees are now involved who did not participate in the election last July, and a request is now made for voting the crafts separately."<sup>93</sup> This may appear surprising, particularly in view of a finding to the effect that the carrier had adopted an intransigent attitude toward the proper fulfillment of its obligations to the original victor, unless it be realized that the Board regards the maintenance of industrial peace as its paramount objective. In several other cases, re-elections were ordered three years subsequent to election and certification by the Board, at the behest of labor organizations.<sup>94</sup>

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<sup>90</sup> In the Matter of Delaware, Lackawanna & Western Railroad Co., Case No. R-291 (1938); In the Matter of the New York Central Lines, Case No. R-454 (1938).

<sup>91</sup> In the Matter of the Pittsburgh & Lake Erie R. R. Co., Case No. R-290 (1938). "If the evidence were held not to support this conclusion, it could only be on the ground that the word 'dispute' is too mild to describe the conflict among these employees."

<sup>92</sup> In the Matter of the Boston & Maine Railroad, Case No. C-950 (1935).

<sup>93</sup> *Idem*.

<sup>94</sup> In the Matter of the Akron, Canton & Youngstown Railway Co., Case No. R-287 (1938); In the Matter of the Sacramento Northern Railway, Case No. R-495 (1938); In the Matter of Norfolk & Western Railway Co., Case No. R-549 (1939).

The National Mediation Board has adopted a substitutionary theory of contract whereby a change in representation may occur without effecting the termination of continuing agreements.<sup>95</sup> To support its position, it reasoned that the 1934 amendments place no restrictions upon the right of employees to choose their representatives,<sup>96</sup> and vest no authority in the Board to pass judgment upon either the validity or invalidity of existing contracts.<sup>97</sup> It also voiced its apprehension that a holding to the contrary would promote employer interference with the selection of employee representatives.<sup>98</sup>

The majority representative enjoys the exclusive right to negotiate collective agreements involving wages, hours, or working conditions for the entire unit.<sup>99</sup> If none of the contesting agencies manages to secure a majority, the Board has followed the practice of refusing to issue any certification whatever.<sup>100</sup> Individual employees and

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<sup>95</sup> "When there is an agreement in effect between a carrier and its employees signed by one set of representatives and the employees choose new representatives who are certified by the Board, the Board has taken the position that a change in representation does not alter or cancel any existing agreement made in behalf of the employees by their previous representatives. The only effect of a certification by the Board is that the employees have chosen other agents to represent them in dealing with the management under the existing agreement. If a change in the agreement is desired, the new representatives are required to give due notice of such desired change as provided by the agreement or by the Railway Labor Act. Conferences must then be held to agree on the changes exactly as if the original representatives had been continued." First Annual Report of the National Mediation Board (1935), p. 23.

<sup>96</sup> In the Matter of the Oklahoma Railway Co., Case No. R-283 (1937).

<sup>97</sup> In the Matter of the Dayton Union Railway Co., Case No. R-39 (1934).

<sup>98</sup> "If the contract [signed by the former representatives] were to prevail, it would open the door to a carrier to make or maintain a contract with a labor union whether such labor union is genuinely representative of the employees or not, thus enabling the carrier to have a voice . . . in the selection of representatives." In the Matter of the Oklahoma Railway Co., Case No. R-283 (1937).

<sup>99</sup> In the Matter of the Delaware, Lackawanna & Western Railroad Co., Cases No. M-199 and R-358 (1937). The Board certifies on a craft basis, regardless of the existence of plural bargaining agencies on a single road. For instance, in the Matter of the Great Northern Railway Co., Case No. R-497 (1938), a group of American Federation of Labor craft unions was certified for machinists, blacksmiths, molders, electrical workers and power house employees, while the rival Associated Organization of Shop Craft Employees was held entitled to represent the boilermakers, sheet metal workers and carmen.

<sup>100</sup> In the Matter of the New York, Chicago & St. Louis Railroad, Case No. R-40 (1934), and subsequent decisions.

minorities may be permitted by the carrier to discuss grievances without loss of working time, or to select local representatives for the same purpose,<sup>101</sup> and have the additional right of selecting their own representatives to handle grievances arising under the majority agreement.<sup>102</sup> Moreover, minorities are further protected by the statutory prohibition of closed or preferential shop.<sup>103</sup>

The rarity of strikes and stoppages on the railroads since 1934<sup>104</sup> and particularly of those arising out of rivalry between labor organizations, attests to the efficacy of the procedures employed. The Board has asserted that "the record thus far made demonstrates that Congress has established an effective machinery for settling labor disputes in the railroad industry and one that is tending to produce a system of labor relations more beneficial to men and management alike than any heretofore known."<sup>105</sup> In any complete evaluation, however, the quasi-public character of the industry, and the consequent public feeling against strikes, must be placed in the balance.

#### THE N. R. A. BOARDS

Labor disputes in industries subject to the National Industrial Recovery Act<sup>106</sup> were reviewable by code boards provided directly by the individual codes or set up by executive order upon the authority of the congressional enactment. Not all of these encountered rival union controversies in the course of their activities.

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<sup>101</sup> Railway Labor Act, as amended 1934, Section 2(4).

<sup>102</sup> In the Matter of the Delaware, Lackawanna & Western Railroad, Cases No. M-199 and R-358 (1937).

A commentator, 3 *I. J. A. Bulletin* No. 5 (1934), considers the grievance machinery inadequate as far as minorities are concerned: "A union representing a majority of the employees of a single railroad is under Section 2 the only party with whom the employer may make a contract for wages, hours and working conditions. Nevertheless, under Section 3, disputes arising out of the contract may at the option of the employer be referred to a board, not of neutrals, but of employers and representatives of other unions, which may well be rivals of the union having the grievance. It is difficult to see how independent unions which are not national in scope can survive under such circumstances. Nor is it apparent how a national union can be slowly built up under such adverse conditions."

<sup>103</sup> Railway Labor Act, as amended in 1934, Section 2(4).

<sup>104</sup> Strike statistics are analyzed in the First, Second, Third and Fourth Annual Reports of the National Mediation Board, 1935-1938.

<sup>105</sup> Second Annual Report of the National Mediation Board (1936), p. 35.

<sup>106</sup> See *supra*, p. 119, for a discussion of the labor provisions of this statute.

Those which did, however, promulgated an interesting series of decisions well worth detailed consideration.

*A. The National Bituminous Coal Labor Board*—The National Coal Board's authority was based upon Article 7, Section 5 of the bituminous coal code, and was subject to the limitations of Section 7(a) of the N. I. R. A.<sup>107</sup> The national board itself was almost dormant, but its six regional divisions proved to be active participants in coal industrial relations. In particular, Divisional Board No. II, covering Illinois, Indiana and Iowa, was involved in a series of bitter inter-union disputes between the United Mine Workers of America and the Progressive Miners of America. It is the work of this division that is of chief interest here.

Under the code, labor controversies in the mines were to be submitted to the divisional boards if joint conferences between employers and employees failed to secure peaceful solutions. If the controversies revolved about a question of representation, the boards were empowered to determine the proper representatives by investigation and, where necessary, secret ballot. Their decisions were effective for a period of "not longer than six months, to be fixed by the Board."<sup>108</sup>

Board No. II, in the one case in which it ordered a poll on the question of the conflicting claims of United and Progressive, specified that the representatives chosen by the majority were to speak for all the men in the mine.<sup>109</sup> In connection with the same controversy, it disclaimed authority to select a unit for referendum purposes more comprehensive than the individual plant or mine.<sup>110</sup>

The effect of existing collective agreements upon the power of the Board to order elections was the chief bone of contention. The circumstances under which this question arose, roughly parallel in

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<sup>107</sup> Lorwin and Wubnig, *Labor Relations Boards* (Washington, 1935) p. 429.

<sup>108</sup> *Idem.*

<sup>109</sup> In the Matter of the Mark Mine, Jan. 4, 1934. There was no indication, however, as to the construction of the term "majority." (All citations of Coal Board cases refer to mimeographed copies of the decisions).

<sup>110</sup> Public Statement issued May 22, 1934, quoted in part in Lorwin and Wubnig, *op. cit.* at n. 107, p. 433, note 29.

several cases,<sup>111</sup> were as follows: the mine owners in the Illinois coal fields had been operating under a United Mine Workers contract for several years prior to the passage of the National Industrial Recovery Act. In August 1932, these contracts were renewed, and later extended to April 1935. Largely as a result of employee opposition to the terms of the contracts, the Progressive Miners of America was organized in the fall of 1932 as a secession movement. Having a majority in a number of mines, Progressive was in several instances accorded *de facto* recognition, evidenced by the grant of special privileges, including the check-off. Where recognition was not forthcoming, strikes were declared. The disputes were brought before the Board by Progressive, which maintained that it was the legal representative of the miners, and that the United contracts were invalid.

The Board, in denying the petitions and upholding the United contracts, stood upon the legalistic ground that "where a contract or agreement was in force before the enactment of the National Recovery Act the application of Section 7a, so far as it relates to collective bargaining, cannot be required until the end of the contract or agreement period. The demand for application of Section 7a must wait upon the expiration of valid contracts."<sup>112</sup> A ruling upon the validity of existing contracts would constitute, it was felt, both an unwarranted retroactive application of the Recovery Act<sup>113</sup> and an usurpation of the functions of the civil courts.<sup>114</sup> Moreover,

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<sup>111</sup> In the Matter of Peabody Mines, Jan. 9, 1934; Union Colliery Co., March 5, 1934; United Electric Coal Co., Mine No. 9 Cuba, Ill. and Freeburg Mines, March 12, 1934; St. David Mine of the Truax-Traer Co., March 13, 1934; Du Quoin Mine of the United Electric Coal Co., March 14, 1934; Dorthell Coal Mine No. 2, June 23, 1934.

<sup>112</sup> In the Matter of Peabody Mines, Jan. 9, 1934. Ora Gasaway, a member of the Board and also a member of the United Mine Workers, abstained from voting. This decision was affirmed by the National Bituminous Coal Labor Board, N. R. A. Release No. 3425, Feb. 21, 1934.

<sup>113</sup> "The jurisdiction of this Board, under the provisions of the National Industrial Recovery Act, does not extend retroactively to events that took place prior to the enactment of the National Industrial Recovery Act." In the Matter of Union Colliery Co., March 5, 1934.

<sup>114</sup> "The Bituminous Coal Labor Board, Division II, is not a court of law and must wait upon the action of courts of law for the determination of questions such as those concerning the validity of the contract in this case . . . . The Board respectfully submits that until this contract has been set aside by due process of law the Board has no alternative but to accept the contract as lawful." In the Matter of Peabody Mines, Jan. 9, 1934.

the allegation that at the extension date United had the allegiance of less than a majority of the employees covered was held immaterial to the proceedings inasmuch as no invalidating stricture existed at that date;<sup>115</sup> and the further charge that the contract was made in order to evade the provisions of the National Recovery Act, then pending in Congress, was assigned no weight because of the highly conjectural status of the Act at that time.<sup>116</sup>

This series of decisions has led close students of the Board to declare that it was biased in favor of United.<sup>117</sup> However, its refusal to invalidate the contracts was upheld by implication in the Federal courts.<sup>118</sup> Furthermore, the same criteria were applied to pre-existing contracts held by Progressive;<sup>119</sup> a United contract signed *subsequent* to the passage of N. R. A. was set aside on the ground that the right of United to represent the employees pursuant to the provisions of Section 7a was questionable;<sup>120</sup> and a Progressive agreement with an operator who had been induced by coercion verging upon the illegal to abrogate a United contract was declared valid.<sup>121</sup>

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<sup>115</sup> In the Matter of Union Colliery Co., March 5, 1934.

<sup>116</sup> *Idem*.

<sup>117</sup> Lorwin and Wubnig, *op. cit.* at n. 107, p. 434. "This insistence upon the sanctity of contract rights, Section 7(a) notwithstanding, was more than mere legalistic reasoning. It illustrated the way in which the U. M. W. A. used the machinery of the code to strengthen its position at the expense of a contending bona fide labor organization." See also "The Influence of the National Labor Relations Board Upon Inter-Union Conflicts," 38 *Columbia Law Review* 1243 (1938), note 5.

<sup>118</sup> *United Electric Coal Co. v. Rice*, 80 Fed (2d) 1, *cert. den.* 297 U. S. 714 (1935).

<sup>119</sup> In the Matter of the Sahara and Wasson Coal Mines, Jan. 13, 1934, where a United petition to outlaw a Progressive contract calling for a wage scale below the minimum specified in the coal code was denied.

<sup>120</sup> In the Matter of the Mark Mine, Jan. 4, 1934.

<sup>121</sup> In the Matter of the Rex Mine, April 13, 1934. The reasoning here was like that in the Peabody case: "If the operator of the Rex Mine, in order to enter into this contract, illegally abrogated a contract with the United Mine Workers of America, then the remedy would be in a court of law . . . . The Bituminous Coal Labor Board could not meet the requirements of giving 'due process of law' in the determination of the strictly legal question as to the rights and wrongs of the parties in the abrogation of the contract." Ora Gasaway dissented, maintaining that the prior U. M. W. A. contract was valid.

The work of the remainder of the divisional boards, while interesting in many respects, is not pertinent here.<sup>122</sup>

*B. The Automobile Labor Board*—The Automobile Board was created by the terms of a settlement between the National Automobile Chamber of Commerce and the American Federation of Labor,<sup>123</sup> negotiated through the efforts of President Roosevelt at a time when rival unionism was rampant in the industry.<sup>124</sup> Included in the settlement was a specific provision for the introduction of proportional representation: "If there be more than one group, each bargaining committee shall have total membership pro rata to the number of men each member represents."<sup>125</sup>

In a public statement elaborating upon the terms of the settlement, President Roosevelt left no doubt as to its import:

. . . we have set forth a basis on which, for the first time in any large industry, a more comprehensive, a more adequate and a more equitable system of industrial relations may be built than ever before. It is my hope that this system may develop into a kind of works council in industry in which all groups of employees, whatever may be their choice of organization or form of representation, may participate in joint conferences with their employers.<sup>126</sup>

In pursuance of its mandate, the Board devised an elaborate scheme of election. Each plant was divided into electoral districts,<sup>127</sup> and a separate primary held in each district. The two candidates receiving the highest number of votes entered a final election, the winner becoming a member of the plant council. The Board reserved the right to appoint additional members when necessary to make representation truly proportional to voting strength. The voters were required to designate individuals on the ballot,

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<sup>122</sup> There was one decision of Divisional Board No. V, however, upholding the validity of a U. M. W. A. contract and denying a rival's election petition, that was suggestive of Board II decisions. See *Western Miners Union of America v. United Mine Workers of America*, April 20, 1934, cited by Lorwin and Wubnig, *op. cit.* at n. 107, p. 433, note 29.

<sup>123</sup> Lorwin and Wubnig, *op. cit.* at n. 107, p. 355. The settlement was formulated on March 25, 1934.

<sup>124</sup> Wolman, Leo "Collective Bargaining," 140 *Nation* 297, March 13, 1935.

<sup>125</sup> Final Report of the Automobile Labor Board, August 6, 1935, Introduction.

<sup>126</sup> *New York Times*, March 26, 1934.

<sup>127</sup> Electoral districts were determined by employee representatives and the Board's electoral officials. Wolman, *op. cit.* at n. 124.

although there was place, following the names of those so chosen, to specify labor group affiliation.<sup>128</sup>

Sixty-three nominating elections were held during the life of the Board. The results, shown in Table 1, are significant chiefly as illustrative of the diversity of organizations then purporting to represent the automobile workers.<sup>129</sup>

TABLE 1  
TOTAL NUMBER OF VOTES IN 63 NOMINATING ELECTIONS  
CONDUCTED BY THE AUTOMOBILE LABOR BOARD\*  
1934-1935

<i>Affiliation</i>	<i>Total Number of Votes</i>
Unaffiliated .....	111,878
Employees' Associations .....	21,774
American Federation of Labor .....	14,057
Associated Automobile Workers of America .....	6,083
Mechanics Educational Society of America .....	665
Pattern Makers League of North America .....	132
Auto Workers Union .....	72
Association of Certified Welders .....	36
Industrial Workers of the World .....	26
Society of Designing Engineers .....	24
Auto Service Mechanics Association .....	16
Dingmen's Welfare Club .....	10
Pontiac Chamber of Labor .....	4
International Association of Machinists .....	2
Auto Makers of America .....	1
Blank Ballots .....	4,345
Void Ballots .....	4,025
Total Votes Cast .....	163,150

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\* *Source*—Final Report of the Automobile Labor Board, August 6, 1935.

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<sup>128</sup> Final Report of the Automobile Labor Board, *op. cit.* at n. 125. Members of the bargaining agency were elected for a term of one year, but might be recalled during that period by petition of a majority of the eligible voters in the districts from which they were elected.

<sup>129</sup> The high proportion of "Unaffiliated" votes may have been due, in part, to the voters' failure to insert labor affiliation after the name of the individuals chosen. A total of 63 bargaining agencies was chosen. The number of individuals elected to them was 784, with the Board appointing an additional 126. This would make 15 the average number of persons constituting a plant bargaining agency. The range, however, was wide.

A great deal of controversy ensued over the effectiveness of this plan as a method of achieving collective bargaining. The Board claimed for it a measure of success:

It is the Board's observation that in the majority of instances the agencies acted as effective representatives of the interests of their constituents, that the issues they discussed with representatives of employers were no different and no fewer in number than under any system of collective bargaining, that the percentage of successful outcome to negotiations was no less here than elsewhere and that, except in one bargaining agency, representatives of different labor groups serving on the same bargaining agency had little difficulty in getting along with one another.<sup>130</sup>

Professor Wolman, the Board's chairman, maintained that the industrial situation made some form of minority representation mandatory<sup>131</sup> and asserted that the Board's scheme was an effective and practicable solution.<sup>132</sup> The American Federation of Labor, on the other hand, evinced a strong dislike of the entire procedure.<sup>133</sup> William Leiserson of the National Mediation Board disclosed his belief that effective collective bargaining was virtually impossible under the works council plan.<sup>134</sup>

Although it would be fruitless to attempt an evaluation of the Board's effectiveness in safeguarding the representation rights of minorities on the basis of only a few months of activity,<sup>135</sup> one thing was clearly shown by this experiment. It brought home the

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<sup>130</sup> Final Report of the Automobile Labor Board, August 6, 1935, pp. 54-55.

<sup>131</sup> Wolman, *op. cit.* at n. 124: "It is clear from conditions in the industry that there can be no collective bargaining without minority representation. No outside unions have a majority . . . . The real issue in the automobile industry has not been and is not whether there shall be majority rule but by what means the several minorities should have representation in bargaining with the managements."

<sup>132</sup> *Idem*: "Minority groups in the automobile industry, union or non-union, affiliated with the American Federation of Labor or independent of it, have a status which is effectively protected by the prevailing arrangements."

<sup>133</sup> Report of the Executive Council, American Federation of Labor, *Proceedings*, 1934, p. 107.

<sup>134</sup> "Is It Collective Bargaining?" 140 *Nation* 299, March 13, 1935. ". . . the board's friendly intention to promote collective bargaining among the 'unaffiliated' who do not want it actually works out in practice to prevent the employees in those plants, departments, and crafts where they have organized and command a majority from getting the collective bargaining they are entitled to."

<sup>135</sup> Not until December 1934, was the final representation plan announced, and the electoral machinery set in motion. The invalidation of the Recovery Act in May 1935, wiped the slate clean.

proposition that the modern concept of majority rule in industrial relations implies either the existence of a clearly dominant, though not necessarily exclusive, labor union in each bargaining unit to which it is applied, or the intent on the part of its proponents to stimulate the organization of labor in this direction.

*C. The Petroleum Labor Policy Board*—Although formally independent of N. R. A., the Petroleum Labor Board operated within the code of fair competition for the petroleum industry.<sup>136</sup> It was established by Secretary of the Interior Ickes, in his capacity of Petroleum Administrator, in November 1933, but its powers were expressly enumerated only in March 1935, when an executive order provided, in part, that the Board was to investigate violations of Section 7a, mediate or arbitrate any labor disputes arising in the industry, and certify the collective bargaining representatives of the employees. It was authorized to resort to a secret election when necessary. The order further specified that "the person, persons or organization certified as the choice of the majority of those voting, shall be accepted as the representative or representatives of said employees for the purpose of collective bargaining without thereby denying to any individuals [sic] employee or group of employees the right to present grievances, to confer with their employer, or otherwise to associate themselves or act for mutual aid or protection."<sup>137</sup>

In the very first opinion of the Board, decided prior to the executive order, the right of the majority to choose the exclusive representative of all the employees was announced.<sup>138</sup> Soon afterward, in selecting the electoral units, the Board indicated its intention of preventing plural representation within homogeneous groups: "To

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<sup>136</sup> For a description of the peculiar legal status of the Board, see Lorwin and Wubnig, *op. cit.* at n. 107, p. 382.

<sup>137</sup> Order of Secretary Ickes, March 8, 1935, in Decisions of the Petroleum Labor Policy Board, February 6, 1934 to March 13, 1935. The decisions of the Petroleum Labor Board are available in printed form at the Government Printing Office.

<sup>138</sup> In the Matter of the Magnolia Petroleum Co., P. L. P. B. Decisions 1 (1934), affirmed by the Chairman of the Petroleum Administrative Board, P. L. P. B. Decisions 6 (1934). In the Matter of White Eagle Refining Co., P. L. P. B. Case No. 44, July 5, 1934, a majority of 50.9% was certified as the exclusive bargainer.

the extent . . . that facts and circumstances in each case so justify, it is the duty of the Board to certify as collective-bargaining agencies the largest possible groups of employees, numerically speaking, who consider themselves and who can be considered, by present and past objective fact and circumstances, homogeneous and similar."<sup>139</sup>

In the absence of employee desire for broad groupings, however, the Board refused to designate numerically large units when the effect would have been the thwarting of collective bargaining:

In the opinion of the Board the ordering of a company-wide election when no such request has been made by the employees or their representatives would be going beyond the limits of the question submitted to the Board, and it would permit the employees in a large plant in another city to overcome and defeat the wishes of the majority of employees in Fort Worth as to the exercise of their right of collective bargaining and their free choice of representatives.<sup>140</sup>

Although the exact duration of election and certification was not determined, the Board declared that the mere transfer of majority allegiance did not terminate their effects. In the *Lion Oil* case, the International Association of Oil Field Workers was chosen by the majority of employees as their representative at a Board-conducted election on August 27, 1934. Thereafter, the company refused to bargain with the International on the ground that subsequent to the election a majority of the employees had requested that they be governed by an employee representation plan. In an order dated December 20, 1934, the company was found guilty of coercing its employees and was required to recognize the International. Then the Board went on to say:

However, even if there had been no direct or positive proof of coercion or intimidation on the part of the Company, the Board would still, under the circumstances of the case, consider the parties bound by the results of the Government supervised election. To hold otherwise would make it necessary for the Board to order and conduct elections with such frequency that it would paralyze the whole process of collective bargaining. The Board is not prone to believe that the temper of the employees was so mercurial.<sup>141</sup>

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<sup>139</sup> In the Matter of the Shell Oil Co., P. L. P. B. Decisions 59 (1935). In this case, combined A. F. of L. unions polled a majority in a state-wide unit, but the rival Shell Oil Conference Delegates carried several departments within the state. The Board found the state group to be homogeneous, and made its certification accordingly.

<sup>140</sup> In the Matter of Magnolia Petroleum Co., P. L. P. B. Decisions 1 (1934).

<sup>141</sup> In the Matter of the Lion Oil Refining Co., P. L. P. B. Decisions 34 (1934).

The rights of minorities were not neglected. Alleged infringements might be submitted directly to the Board for redress.<sup>142</sup> The Board reserved the right of intervention when majorities discriminated against other groups in the formulation of collective agreements.<sup>143</sup> Finally, minorities were guaranteed that there would be no interference with independent organization, subject only to the qualification that the employer might not use such activity to forestall the legitimate bargaining demands of the majority.<sup>144</sup> The scope of the remaining work performed by the Petroleum Board may best be seen from the data in Tables 2<sup>145</sup> and 3.<sup>146</sup>

TABLE 2  
PETROLEUM LABOR POLICY BOARD  
*Certifications from March 1, 1934 to February 28, 1935*

Total Certifications .....	50	100%
American Federation Labor Affiliates: .....	40	80%
International Ass'n of Oil Field Workers .....	35	70%
Filling Station Employees Union .....	3	6%
Joint Representation of Oil Workers and/or various A. F. of L. craft unions .....	2	4%
Employee Representation Plans .....	9	18%
Other Organizations .....	1	2%

<sup>142</sup> "The position of the Petroleum Labor Policy Board is that when any such minority complains that its rights are adversely affected, the Board will hear and decide the matters in dispute in the same manner that it hears and decides complaints of individuals or majorities." Appeal from Decision in Magnolia Petroleum Co., P. L. P. B. Decisions 1 (1934).

<sup>143</sup> "If the interests of any individual or minority group are not adequately protected by the majority in negotiating a collective agreement, the Board is available to hear and decide complaints and to determine whether or not some other arrangement is necessary to protect these interests." In the Matter of the Shell Oil Co., P. L. P. B. Decisions 59 (1935).

<sup>144</sup> *Idem*: "The Board recognizes the right of minorities to organize themselves for purposes of mutual interest and protection, provided the organization is not promoted by the Company, that the Company does not use coercive methods to force men to join, and provided further that the Company does not utilize the organization of the minority as a means of defeating the rights of the majority in matters of collective bargaining."

<sup>145</sup> From David A. Moscovitz, "Employee Elections Conducted by Petroleum Labor Policy Board," *Monthly Labor Review*, October 1935.

<sup>146</sup> Adapted from Bernheim and Van Doren, *Labor and the Government* (New York, 1935), pp. 92-93.

TABLE 3

## PETROLEUM LABOR POLICY BOARD

*Results of Elections Held from March 8, 1934 to March 5, 1935*

Number of Units Covered .....	35	
Total Votes .....	5,887	100 %
Votes for a Trade Union .....	3,568	60.6%
Votes for Employee Representation .....	1,965	33.4%
Votes for No Representation, Individuals Or Other Organizations .....	354	6.0%
	5,887	100 %

*D. The National Labor Board*—The National Labor Board, tripartite in character, was created by President Roosevelt on August 5, 1933, to "consider, adjust and settle differences and controversies that may arise through differing interpretations of the President's Reemployment Agreement."<sup>147</sup> Not until December 16, however, was a more specific statement of its duties forthcoming, when it was empowered "To settle by mediation, conciliation, or arbitration all controversies between employers and employees which tend to impede the purposes of the National Industrial Recovery Act."<sup>148</sup> On February 1, 1934, specific authorization for the holding of elections by the Board to ascertain employee representatives was granted,<sup>149</sup> with the proviso that the representatives selected by a majority of employees in a given unit were to have the exclusive right to bargain for all.

From its very inception, the Board assumed full quasi-judicial power despite the obvious limitations imposed by the various executive orders. This has been attributed, with good reason, to the necessity of coping with the turbulent labor situation immediately confronting it.<sup>150</sup> The circumscriptions upon its capacity to adjudicate code labor disputes were largely self-imposed, and the subse-

<sup>147</sup> Decisions of the National Labor Board, Vol. I, p. V, U. S. Government Printing Office (1934).

<sup>148</sup> *Ibid.*, p. VI, Executive Order No. 6511, Dec. 16, 1933.

<sup>149</sup> *Ibid.*, p. VII, Executive Order No. 6580. Elections were to be held upon the request of a "substantial number (as defined in the discretion of the Board) of the employees, or any specific group of employees."

<sup>150</sup> Lorwin and Wubnig, *op. cit.* at n. 107, p. 94.

quent functional definitions, far from checking the Board, were intended to bolster its authority in the face of adverse criticism.<sup>151</sup>

Determination of the proper bargaining units was largely left to the employees themselves,<sup>152</sup> but the Board did not permit arbitrary partition of plants in order to favor particular unions.<sup>153</sup> The employer had no voice in the proceedings. Rather, it was held, "Once the employees determine the nature and extent of the organization which they are forming, it is incumbent upon the employer to meet for the purposes of collective bargaining those who represent a majority of the class of employees which their organization is designed to cover."<sup>154</sup>

Although the Board refused to intervene in A. F. of L. jurisdictional disputes,<sup>155</sup> rival union controversies were deemed proper matters for its consideration.<sup>156</sup> In one case it made a fine distinction between disputes in which the employer was directly involved and those with which he was, at best, only indirectly concerned, holding that its jurisdiction was merely mediatory with respect to the latter.<sup>157</sup>

The majority rule in representation was adopted at the outset and applied consistently.<sup>158</sup> The duration of an election was never expressly defined, however. In one instance, where employee representatives had been elected for six-month terms pursuant to a representation plan, the Board refused to order an election until the terms expired.<sup>159</sup> In another, where the supervising agent of the

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<sup>151</sup> *Ibid.*, pp. 106-109.

<sup>152</sup> In the Matter of Edward G. Budd Mfg. Co., 1 N. L. B. 58 (1933); In the Matter of National Lock Co., 1 N. L. B. 15 (1934).

<sup>153</sup> In the Matter of the Gordon Baking Co., 2 N. L. B. 53 (1934).

<sup>154</sup> In the Matter of Edward G. Budd Mfg. Co., 1 N. L. B. 59 (1933).

<sup>155</sup> It was felt that the resolution of controversies of this type was properly a function of the parent with which the contestants were affiliated. Where this function was not exercised, however, the Board ruled that the employer might assign the disputed work at his discretion. See, In the Matter of the Installation of Conveyors in the Philadelphia Post Office, 1 N. L. B. 40 (1933).

<sup>156</sup> Elections were ordered in the following rival union cases: In the Matter of Brockton Shoe Manufacturers Association, 1 N. L. B. 21 (1933); In the Matter of Shoe Manufacturers of New York, 1 N. L. B. 35 (1933).

<sup>157</sup> In the Matter of East Liverpool Potters, 1 N. L. B. 92 (1934).

<sup>158</sup> In the Matter of the Denver Tramway Corp., 1 N. L. B. 64 (1934). Mr. du Pont dissented, maintaining that the bargaining agencies should "represent respectively the number of said employees favoring them."

<sup>159</sup> In the Matter of the Cleveland Worsted Mills, 2 N. L. B. 17 (1934).

Board had inserted in the notice of election the stipulation that representatives would be chosen for the duration of N. R. A., it was held that the agent had exceeded his powers, and the contestants were urged to establish a term, *not to exceed one year*, to their mutual satisfaction.<sup>160</sup>

Employers were not required to negotiate with minorities, even in the absence of majority organizations.<sup>161</sup> Any agreement made with a majority organization was required, however, to apply equally to all employees.<sup>162</sup> "The Board avoided taking a clear stand on the validity of a closed-shop agreement, as such, between an employer and a bona fide trade union . . . . In all of its true decisions which touched upon the closed shop, directly or indirectly, the Board was cautious and obscure; and it is easy to draw conflicting conclusions from the results."<sup>163</sup>

The achievements of the Board, the successes and failures attendant upon its operation as a judicial agency, have been summarized in detail elsewhere.<sup>164</sup> Rival unionism as such did not prove to be a quantitatively important problem,<sup>165</sup> but the few decisions touching upon it have had wider ramification than mere application to the particular disputes by which they were evoked. The majority rule, treatment of the jurisdictional quarrel, bargaining unit determination procedure, were all handed down to the Board's immediate successors. It is in the work of the latter that the full significance of the principles established by the National Labor Board should be sought.

Tables 4 and 5<sup>166</sup> indicate the extent to which the Board became involved in the determination of collective bargaining representatives. It is interesting to note that the role of unions independent

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<sup>160</sup> American Federation of Full Fashioned Hosiery Workers v. Real Silk Hosiery Co., N. R. A. Release No. 4647, April 27, 1934. This ruling does not appear among the printed decisions of the Board.

<sup>161</sup> In the Matter of Gordon Baking Co., 2 N. L. B. 53 (1934).

<sup>162</sup> In the Matter of the Denver Tramway Co., 1 N. L. B. 64 (1934).

<sup>163</sup> Lorwin and Wubnig, *op. cit.* at n. 107, pp. 198-199.

<sup>164</sup> *Ibid.*, chap. viii.

<sup>165</sup> See *infra*, Table 5. Only 28 out of 408 electoral contests, by units, offered the employees a choice between rival trade unions.

<sup>166</sup> Adapted from Emily Clark Brown, "Selection of Employee Representatives," *Monthly Labor Review*, January 1935.

of the American Federation of Labor appears to have been a relatively minor one.

TABLE 4  
RESULTS OF NATIONAL LABOR BOARD ELECTIONS,  
BY UNITS, AUGUST 1933—JULY 1934

	<i>Total Held</i>	<i>Won by Specified Union</i>
All Trade Unions .....	546	408
Independent Unions .....	39*	25
Federal A. F. of L. Locals .....	94	75
International A. F. of L. Unions .....	439*	308

\* In 26 cases in which the contest was between an independent and an international union, the independent won in 16 elections.

TABLE 5  
TYPE OF CHOICE OFFERED IN ELECTIONS CONDUCTED BY THE  
NATIONAL LABOR BOARD, AUGUST 1933—JULY 1934

<i>Union</i>	<i>Won by Trade Union</i>	<i>Lost by Trade Union</i>	<i>Total</i>
All Types .....	408	138	546
Trade Union or Employee Representation .....	323	126	449
Trade Union without Alternative Representation Stated .....	57	12	69
Rival Trade Unions .....	28	0	28

E. *The National Labor Relations Board (Old)*—The first National Labor Relations Board derived its statutory authority from a joint Congressional resolution passed on June 19, 1934,<sup>167</sup> which conferred upon the President of the United States the power to establish a board or boards to “investigate issues, facts, practices or activities of employers or employees in any controversies arising under section 7a of said Act,” if such disputes tended to interfere with interstate commerce. Section 2 of the resolution empowered the boards so constituted to conduct elections when necessary to determine the identity of employee representatives. In less than a

<sup>167</sup> Public Resolution No. 44, 73d Congress, H. J. Res. 375, June 19, 1934, 48 Stat. 1183.

fortnight after Congress had acted, an executive order<sup>168</sup> set up a permanent, impartial three-man board to carry out the mandate of Congress.

Although the Board was authorized to act in mediatory and arbitral capacities, these functions were subordinated, in practice, to quasi-judicial proceedings. Rival unionism was considered principally in connection with the conduct of elections. The Board was authorized to order elections upon its own initiative, the regional divisions being so advised.<sup>169</sup> It was generally expected, however, that election petitions would come from labor organizations.<sup>170</sup> Provision was made for employer petitions, but these might be entertained only by the national board as distinct from its regional divisions. It was also stipulated that a substantial number of employee signatures were requisite to the validity of formal requests for elections.<sup>171</sup> Objection to election petitions offered by rival union groups "was not to be deemed a sufficient reason for withholding the election."<sup>172</sup> In fact, the *absence* of rival unionism was several times advanced in partial justification of denial.<sup>173</sup>

The unit was chosen upon the facts of each case.<sup>174</sup> In the cumulative index to its decisions,<sup>175</sup> the Board lists seven chief criteria applied to the determination of unit: community of interest, eligibility for membership in labor organizations, functional coher-

<sup>168</sup> Executive Order No. 6763, June 29, 1934.

<sup>169</sup> For this and the following related statements, see Lorwin and Wubnig, *op cit.* at n. 107, pp. 304-309.

<sup>170</sup> "The Decisions of the National Labor Relations Board," 48 *Harvard Law Review* 629 (1935): "... although a petition is not absolutely essential, no election has ever been ordered in the absence of one, even where definite opposition had crystallized between competing organizations."

<sup>171</sup> Where 308 employees requested and 1524 opposed an election, the petition was denied: In the Matter of Bethlehem Shipbuilding Corp., 2 N. L. R. B. (old) 138 (1935). 30 out of 700 employees was likewise deemed an insufficient number: In the Matter of Eagle Grocery Co., 2 N. L. R. B. (old) 450 (1935).

<sup>172</sup> Lorwin and Wubnig, *op. cit.* at n. 107, p. 309.

<sup>173</sup> In the Matter of Omaha and Council Bluffs Street Railway Co., 2 N. L. R. B. (old) 45 (1934); In the Matter of Carson, Pirie, Scott & Co., 2 N. L. R. B. (old) 506 (1935); In the Matter of Clark and Wilson, 2 N. L. R. B. (old) 288 (1935); In the Matter of Eagle Grocery Co., 2 N. L. R. B. (old) 450 (1935).

<sup>174</sup> "The question of the proper unit or units must be left for determination according to the circumstances of particular cases as they arise." In the Matter of Houde Engineering Co., 1 N. L. R. B. (old) 35 (1934).

<sup>175</sup> Decisions of the National Labor Relations Board, p. 555.

ence, geographical proximity, history of collective bargaining relations, distinctiveness of occupational differences and organization of the business. The application of these principles had drastic repercussions upon the aspirations of rival organizations in several cases.<sup>176</sup>

The Board held that "the mere existence of internal conflicts of interest does not of itself justify the splitting up of the collective bargaining group into two or more units";<sup>177</sup> and, in general, the fragmentation of a plant to advance the interests of narrow craft unions as opposed to those of functioning plant-wide organizations was refused, for, "Separate bargaining by each occupational group for the wages of its own members would inevitably cause confusion and injustice to particular groups, a state of affairs from which all groups would ultimately suffer."<sup>178</sup>

In a classic opinion, the Board announced its adherence to majority rule. Tracing the history of the application of this prin-

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<sup>176</sup> One of the most interesting was the Matter of the Board of Street Railway Commissioners of the City of Detroit, 1 N. L. R. B. (old) 123 (1934). Here, a group of bus operators, formerly represented by the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, organized an independent union to protect their craft interests. The City of Detroit asked the Board to determine whether or not the busmen constituted a separate bargaining unit. The street car men, a majority of both groups taken together, opposed the secession. The Board ruled that the entire city transportation system constituted a proper unit:

"... when for many years employees have successfully bargained collectively through a single organization of their own choice, there is a distinct presumption against the claim of a suddenly emerging minority group to be recognized as a separate unit for collective bargaining." This was qualified, however, as "without prejudice to the minority group to renew at some future time its application for consideration as a separate bargaining unit, if circumstances should warrant a change."

See also, In the Matter of the Tubize-Chatillon Co., 1 N. L. R. B. (old) 30 (1934); In the Matter of Ely & Walker Dry Goods Co., 1 N. L. R. B. (old) 94 (1934); In the Matter of Hildinger-Bishop Co., 1 N. L. R. B. (old) 127 (1934).

<sup>177</sup> In the Matter of the Board of Street Railway Commissioners, 1 N. L. R. B. (old) 123 (1934).

<sup>178</sup> In the Matter of United Dry Docks, Inc., 1 N. L. R. B. (old) 150 (1934). "In the particular instance this lack of a separate craft status in collective bargaining may or may not have resulted disadvantageously to welders. Even where such disadvantage could be shown it would need in our opinion to be of considerable magnitude to justify splitting off the welders from other crafts which now incorporate them."

ciple by other labor boards and by judicial agencies, the decision goes on to list the reasons for its adoption:

It seems clear that the company's policy of dealing first with one group and then with the other resulted, whether intentionally or not, in defeating the objects of the statute. In the first place, the company's policy inevitably produced a certain amount of rivalry, suspicion and friction between the leaders of the committees . . . .

Secondly, the company's policy, by enabling it to favor one organization at the expense of the other, and thus to check at will the growth of either organization, was calculated to confuse the employees, to make them uncertain which organization they should from time to time adhere to, and to maintain a permanent and artificial division in the ranks . . . .

. . . the company's policy . . . clearly prevented any arrival at collective agreements in the sense intended by the statute . . . . Obviously in the case of a plant-wide agreement it would be impractical to negotiate it and enter into it with the minority group . . . .

The employer would ordinarily gain nothing from this arrangement if the two groups were united, and if they were not united he would gain only what he has no right to ask for, namely, dissention and rivalry within the ranks of the collective bargaining agency.<sup>179</sup>

Employers were ordered to recognize majority representatives as the exclusive bargainers for their employees in 18 cases.<sup>180</sup> The Board refused to commit itself, however, to a precise definition of the term "majority,"<sup>181</sup> stating that its general acceptance of the majority principle did not determine any rule "where in an election, representatives have been chosen by a mere plurality of the votes cast, or by a majority of the votes cast but by less than a majority of all employees entitled to vote."<sup>182</sup> In a later case, a victorious union was credited with "a majority of all the eligible votes cast" at one point, and with "a clear majority of employees eligible to vote" later, but the sufficiency of the former alone was not indicated.<sup>183</sup>

The effects of prior elections and collective agreements were briefly considered. Elections were denied where valid collective

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<sup>179</sup> In the Matter of Houde Engineering Corp., 1 N. L. R. B. (old) 35 (1934).

<sup>180</sup> For the complete list, see Cumulative Index, Decisions of the National Labor Relations Board (old), p: 544.

<sup>181</sup> This question arises only in connection with elections, of course. To be certified without election, an organization is generally required to represent an absolute majority of the employees in a particular unit.

<sup>182</sup> In the Matter of Houde Engineering Corp., 1 N. L. R. B. (old) 35 (1934).

<sup>183</sup> In the Matter of Kohler Co., 2 N. L. R. B. (old) 248 (1935).

agreements for terms of one<sup>184</sup> and two<sup>185</sup> years were in existence at the time the petition was filed; where, pursuant to an agreement between an employer and the United States Department of Justice, with the sanction of the National Labor Board, an election had been initiated but not yet completed;<sup>186</sup> and where a recent election had been held, although one of two contesting unions refused to participate because of its opposition to the majority clause in the election rules.<sup>187</sup> On the other hand, neither selection of representatives in accordance with the provisions of employer supported employee-representation plans<sup>188</sup> nor alleged agreements with such organizations<sup>189</sup> were permitted to stand in the way of Board-supervised elections. The possibility of successive elections when clearly in the public interest was recognized, but no definite time intervals were specified.<sup>190</sup>

Minorities or minority organizations were considered unqualified to engage in collective bargaining for any employees in the face of a request for negotiation previously made by the majority representative.<sup>191</sup> But no rule was promulgated to cover the situation "where the majority group has taken no steps toward collective bargaining."<sup>192</sup> The majority, of course, was not permitted to transgress

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<sup>184</sup> In the Matter of Omaha and Council Bluffs Street Railway Co., 1 N. L. R. B. (old) 190 (1934). The petitioner was given the express privilege of renewing its application at a reasonable time prior to the expiration of the contract.

<sup>185</sup> In the Matter of the McCall Co., 2 N. L. R. B. (old) 200 (1935).

<sup>186</sup> In the Matter of S. Dresner & Son, 2 N. L. R. B. (old) 207 (1935). The Board felt that to an order an election "would be in derogation of the agreement between the government and the company."

<sup>187</sup> In the Matter of Columbian Steel Tank, 1 N. L. R. B. (old) 99 (1934).

<sup>188</sup> In the Matter of B. F. Goodrich Co., 1 N. L. R. B. (old) 188 (1934); In the Matter of Firestone Tire and Rubber Co., 1 N. L. R. B. (old) 173 (1934); In the Matter of International Nickel Co., 2 N. L. R. B. (old) 271 (1935).

<sup>189</sup> In the Matter of Westport Lumber Co., 2 N. L. R. B. (old) 294 (1935); In the Matter of the Kaynee Co., 2 N. L. R. B. (old) 33 (1934).

<sup>190</sup> In the Matter of the Kohler Co., 1 N. L. R. B. (old) 72 (1934).

<sup>191</sup> In the Matter of Guide Lamp Corp., 1 N. L. R. B. (old) 47 (1934); In the Matter of Hildinger-Bishop Co., 1 N. L. R. B. (old) 127 (1934); In the Matter of Los Angeles Railway Corp., 2 N. L. R. B. (old) 63 (1934).

<sup>192</sup> In the Matter of Houde Engineering Corp., 1 N. L. R. B. (old) 35 (1934). See also, 48 *Harvard Law Review* 629, *op. cit.* at n. 170: "it is not

upon the legitimate interests of minorities, the Board reserving the right to grant appropriate relief to oppressed groups,<sup>193</sup> and hinting at a relaxation of majority rule "where the majority group imposes rules of participation in its membership and government which exclude certain employees whom it purports to represent in collective bargaining."<sup>194</sup>

The Board approached the closed shop issue cautiously by announcing in the *Houde* case that the majority rule "does not compel employees to join the organization representing the majority. It does not establish a closed shop, nor necessarily lead to a closed shop, that being a matter for negotiation." Although the validity of closed shop agreements was at stake in several cases, the question was never clearly resolved.<sup>195</sup>

On several other related points, a less equivocal attitude was adopted. A substitutionary theory of contract was clearly implied in the express ratification of a collective agreement despite the disqualification of the negotiating organization as the bargaining representative of the employees.<sup>196</sup> Employees were held to retain their

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clear that the statute would be considered violated by dealing with minority representatives, or even with a union representing no employees, where representatives of the majority have not yet begun to bargain."

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<sup>193</sup> In the Matter of the Board of Street Railway Commissioners, 1 N. L. R. B. (old) 123 (1934).

<sup>194</sup> In the Matter of Houde Engineering Corp., 1 N. L. R. B. (old) 35 (1934).

<sup>195</sup> In the Matter of Tamaqua Underwear Co., 1 N. L. R. B. (old) 10 (1934), a closed-shop contract with a *company-dominated* union was declared invalid. The Bennet Shoe Co. case, 2 N. L. R. B. (old) 29 (1934), in which a closed-shop agreement figured, was decided on peculiar grounds. The United Shoe and Leather Workers Union, representing a majority of the employees, secured a closed-shop agreement, whereupon members of the rival Shoe Workers Protective Union joined it, but without at the same time relinquishing their original membership. When notified by the United of a constitutional inhibition against dual membership, they refused to resign from Protective, and were expelled from United and discharged from employment. The N. L. R. B. ruled that by joining United the discharged men had assented to both its Constitution and the closed-shop agreement, and consequently dismissed the complaint.

In the Matter of Hildinger-Bishop Co., 1 N. L. R. B. (old) 127 (1934) the Board, while refraining from "intimating an opinion on the validity of such closed shop provisions under Section 7(a) where contained in an agreement otherwise valid," set aside a closed-shop contract embodied in an agreement negotiated with a union representing none of the employees.

<sup>196</sup> In the Matter of North Carolina Granite Corp., 1 N. L. R. B. (old) 89 (1934).

status after they had gone out on strike,<sup>197</sup> but replacements employed continuously for a period of four years were deemed to have long since "graduated from the imperfect employment status of strike-breakers," and the union representing the original strikers was held to be no longer entitled to recognition.<sup>198</sup>

An analysis of employee elections conducted by the National Labor Relations Board, partially presented in Table 6, yields some interesting results.<sup>199</sup> In only 6 elections, in which 649 votes were cast, was a question of rival union jurisdiction involved. Negotiations subsequent to election resulted in harmonious relationships in 80.3 percent of the units won by A. F. of L. unions, as contrasted with only 42.3 percent for independents, leading to the hypothesis that "employers are more willing to recognize international unions affiliated with the American Federation of Labor."<sup>200</sup> Independents, however, are seen to have a fairly good record in elections won, although the sample is inadequate for generalization.

TABLE 6

ANALYSIS OF VOTES HELD UNDER THE SUPERVISION OF THE  
NATIONAL LABOR RELATIONS BOARD (OLD)

*Won by Union, July 10, 1934—June 16, 1935 \**

	Units Involved			No. of Employees Eligible to Vote	Valid Votes Cast		
	Total	Won by Union No.	Union %		No.	Votes for Union No.	%
All Elections	579	337	58.2	56,814	45,287	26,478	58.5
A. F. L. Affiliates	534	302	56.6	52,186	41,683	23,961	57.4
(a) Inter. Unions	495	270	54.5	38,405	30,889	17,161	55.6
(b) Federal Locals	39	32	82.1	13,781	10,794	6,800	63.0
Independent Unions	45	35	77.8	4,628	3,604	2,517	69.8

\* Source—Monthly Labor Review, May and October 1935.

<sup>197</sup> In the Matter of Resnick Bros., 2 N. L. R. B. (old) 217 (1935); In the Matter of the Continental Machine Specialties Inc., 2 N. L. R. B. (old) 318 (1935).

<sup>198</sup> In the Matter of Hildinger-Bishop Co., 1 N. L. R. B. (old) 127 (1934).

<sup>199</sup> George Shaw Wheeler, "Employee Elections Conducted by National Labor Relations Board," *Monthly Labor Review*, May, October 1935.

<sup>200</sup> *Idem*.

The activities of the several N. R. A. boards<sup>201</sup> were brought to an abrupt conclusion with the invalidation of the National Recovery Act. Within a brief period, however, more comprehensive labor legislation was adopted to fill the gap left by the discard of the old. The new statutes were largely codifications of the principles worked out by the old labor boards, together with some additions designed to clarify formerly vague concepts. Moreover, while the problems facing the newly established tribunals, particularly in regard to rival unionism, were of unparalleled magnitude, they were to a large extent foreshadowed in the basic decisions which had already been made. The present National Labor Relations Board has, to be sure, written a new chapter in the history of American industrial relations; but, as in all history, it built upon the foundations established by its predecessors.

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<sup>201</sup> While the work of the numerous other code boards, particularly those in the steel and textile industries, is of great interest, no description will be undertaken here in view of the absence of decisions relating to rival unionism.

## THE NATIONAL LABOR RELATIONS BOARD

The rights and duties created by the National Labor Relations Act, together with the statutory functions of the enforcement agency created thereby, have already been outlined.<sup>1</sup> It was pointed out that while the Act was not primarily intended to deal with inter-union relationships, the determination of employee representatives generally involved disputes of this nature. It is probable that the incidence of such controversies would have been negligible had not the most important dual union struggle in the history of American labor flared up shortly after the adoption of the new legislation.<sup>2</sup> The career of the National Labor Relations Board,<sup>3</sup> sketched in terms of its own decisions, affords a valuable commentary upon the difficulties of attempted alleviation by a neutral of the bitterness engendered by internecine strife.

The Board was by no means anxious to implicate itself in so delicate a situation. Chairman Madden publicly stated that rival unionism created problems "which were not anticipated when the statute was passed"<sup>4</sup> and "added somewhat to the volume of [the] work and enormously to the difficulty of it."<sup>5</sup> The opportunity to refuse to consider jurisdictional disputes, on the theory that they were best determinable by the parent federation, was not neglected.<sup>6</sup>

<sup>1</sup> *Supra*, pp. 121-130.

<sup>2</sup> *Supra*, pp. 18-29.

<sup>3</sup> The National Labor Relations Board will hereafter be referred to as the Board, the Labor Board, or the N. L. R. B.

<sup>4</sup> *New York World-Telegram*, September 7, 1937.

<sup>5</sup> *New York Times*, October 6, 1938.

<sup>6</sup> Aluminum Company of America, 1 N. L. R. B. 530 (1936); Axton-Fisher Tobacco Co., 1 N. L. R. B. 604 (1936); Standard Oil of California, 1 N. L. R. B. 614 (1936); Jones Lumber Co., 1 N. L. R. B. 855 (1937); Curtis Bay Towing Co., 4 N. L. R. B. 360 (1937); Showers Brothers Furniture Co., 4 N. L. R. B. 585 (1937); Long Bell Lumber Co., 16 N. L. R. B. No. 74 (1939); Weyerhaeuser Timber Co., 16 N. L. R. B. No. 75 (1939); First Annual Report, National Labor Relations Board (1936), p. 109; Note, 38 *Columbia Law Review* 1243 (1938).

Vice-President Bugniazet of the A. F. of L. made the accusation that "the Board has illegally and persistently set itself up as an arbiter and final auth-

But where a representation controversy involved labor organizations acting independently, although nominally co-affiliated,<sup>7</sup> the Board considered, to quote its Chairman, that its "duty under the statute [was] plain."<sup>8</sup> This duty entailed the assertion of jurisdiction over rival union representation controversies.

#### A. EXISTENCE OF A QUESTION CONCERNING REPRESENTATION

Prerequisite to the jurisdiction of the Board in representation contests is the existence of a question concerning the representation of employees.<sup>9</sup> Where no such finding can be made, the Board refuses to entertain petitions for investigation and certification.<sup>10</sup> Thousands of petitions have been dismissed without hearing on the theory that such dismissal is "an administrative act which lies wholly within the discretion of the Board."<sup>11</sup> Where reasons were assigned, satisfactory bargaining relationships between the employer

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ority in the matter of jurisdictional disputes." American Federation of Labor, *Proceedings*, 1937, p. 490. The accuracy of this statement is questionable. On the contrary, the Board has manifested the utmost respect for the desires of unionists in the matter of jurisdictional issues. See: Hoffman Beverage Co., 8 N. L. R. B. 1367 (1938); Hearings before the Senate Committee on Education and Labor, 76th Congress, 1st Session (1939), Proposed Amendments to the National Labor Relations Act, p. 1097, testimony of Mr. Joseph Padway.

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<sup>7</sup> Interlake Iron Corporation, 2 N. L. R. B. 1036 (1937); Federal Knitting Mills, 3 N. L. R. B. 257 (1937).

<sup>8</sup> *New York World-Telegram*, Sept. 7, 1939. Mr. Joseph Padway, however, asserted that "there are those who believe that the Board should never have taken jurisdiction in disputes between American Federation of Labor and Congress of Industrial Organizations unions . . . ." Hearings before the Senate Committee on Education and Labor, *op. cit.* at n. 6, p. 1114.

<sup>9</sup> National Labor Relations Act, *op. cit.*, Section 9(c); National Labor Relations Board, First Annual Report (1936), p. 104.

<sup>10</sup> Under its original rules and regulations, as amended April 27, 1936, Article III Section I, petitions could be filed only by employees or labor organizations. The new rules, effective July 14, 1939, by Article III Section I, permit employers to file such petitions when "two or more . . . labor organizations have presented to the employer conflicting claims that each represents a majority of the employees in the unit or units set forth . . . ." Section 3 of the same article further provides that "the Board shall not direct an investigation on a petition filed by an employer unless it appears to the Board that two or more labor organizations have presented to the employer conflicting claims that each represents a majority of the employees in the bargaining unit or units claimed to be appropriate."

<sup>11</sup> Hearings before the House Committee on Labor, 76th Congress, 1st Session (1939), Proposed Amendments to the National Labor Relations Act, p. 1103. The Board asserted, however, that petitioners were practically always aware of the reason for dismissal.

and a majority of his employees,<sup>12</sup> the fact that the petitioner represented but a small<sup>13</sup> minority<sup>14</sup> of the employees, the existence of a valid collective agreement,<sup>15</sup> and the failure to specify an appropriate unit<sup>16</sup> were held to foreclose the existence of a question. The facts which establish a controversy are "too diversified to be catalogued."<sup>17</sup> In general, "the Board will consider that the question of representation has arisen . . . in any situation where certification would grant a benefit provided for by the Act which is not already being enjoyed."<sup>18</sup>

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<sup>12</sup> Pacific Steamship Company, 2 N. L. R. B. 214 (1937); Oakland Warehouse and Mills, No. XX-R 152, C. C. H. par. 21528 (1938); Century Woven Label Co., 8 N. L. R. B. 665 (1938); Todd Seattle Dry Docks, 2 N. L. R. B. 1070 (1937). In the first three cases, the petition was filed by the majority union. "The only reason such a labor organization would desire an official certification would be to discourage the organization and recognition of rival unions. Once there has been an official certification, the employer is no longer at liberty to recognize a rival union even as agent for its members." "The Labor Board and the Courts," 32 *Illinois Law Review* 568 (1938), note 43.

<sup>13</sup> In Gate City Cotton Mills, 1 N. L. R. B. 57 (1935), the Board indicated that it would not be bound by quantitative considerations alone: "We recognize the undesirable aspects of ordering elections merely at the instance of an individual employee, or very small and non-representative groups. On the other hand, it suffices if there is evidence showing probable cause for holding a secret ballot in order to dispel doubt or to remove a fruitful source of strife. The degree or magnitude of the question concerning representation is discretionary rather than jurisdictional."

<sup>14</sup> This does not imply, however, that a petitioner must represent a majority of the employees. Indeed, "the existence of such a majority would obviate the necessity of holding an election." Consolidated Aircraft Corporation, 7 N. L. R. B. 1061 (1938). It is sufficient to prove the existence of a substantial controversy. Samson Tire and Rubber Co., 2 N. L. R. B. 148 (1936). For cases in point, see Williams Dimond & Co., 2 N. L. R. B. 859 (1937); Todd Seattle Dry Docks Inc., 2 N. L. R. B. 1070 (1937); Minneapolis Moline Power Implement Co., 14 N. L. R. B. No. 72 (1939); General Electric Co., 15 N. L. R. B. No. 112 (1939).

<sup>15</sup> See cases cited *infra*, n. 99.

<sup>16</sup> See cases cited at 38 *Columbia Law Review* 1243 (1938), note 42; National Labor Relations Board, Third Annual Report (1938), p. 132; William G. Rice, "The Legal Significance of Labor Contracts Under the National Labor Relations Act," 37 *Michigan Law Review* 693 (1939), at p. 717.

<sup>17</sup> National Labor Relations Board, Second Annual Report (1937), p. 105. But see National Labor Relations Board, Third Annual Report (1938), pp. 128-129, for a partial list of such factors.

<sup>18</sup> "The Labor Board and the Courts," 32 *Illinois Law Review* 568 (1938).

## B. DETERMINATION OF THE APPROPRIATE UNIT

As a preliminary to the ascertainment of the desires of employees, it is necessary to demarcate constituencies within which the determinations may be made. No single phase of the Board's work has given rise to more controversy than this, largely because of structural differences between the A. F. of L. and the C. I. O.<sup>19</sup> Each group has accused the Board of partiality to the other.<sup>20</sup> Neutral observers,<sup>21</sup> however, and the Board itself,<sup>22</sup> have staunchly contended that unit decisions were made with the sole purpose of effectuating the policies of the Act.

Prior to the schism in the ranks of labor, the Board based its decisions upon a number of objective criteria, among which were the self-organization of the employees, their mutual interests, the functional coherence of the business, and considerations of geography,<sup>23</sup> the paramount objective being the facilitating of collective

<sup>19</sup> The significance of such differences are discussed *supra*, p. 34.

<sup>20</sup> This has been the chief bone of contention between the A. F. of L. and the Board. See: Hearings before the Senate Committee on Education and Labor, *op. cit.* at n. 6, pp. 632, 667, 669, 843, 1031, 1032, 1034, 1035, 1039; Hearings before the House Committee on Labor, *op. cit.* at n. 11, pp. 642, 734, 761, 854, 859, 860. The C. I. O. has also had occasion to criticize the Board for decisions adverse to its interests. The 1939 Convention adopted a resolution critical of the Board's policy of "permitting craft organizations to raid established industrial unions and to carve out craft units indiscriminately and arbitrarily from industrial bargaining units . . . ." Congress of Industrial Organizations, *Daily Proceedings of the Second Constitutional Convention*, 1939, p. 67.

<sup>21</sup> See particularly, R. A. Nixon, "Appropriate Collective Bargaining Units," 17 *Harvard Business Review* 317 (1939), and Mr. Nixon's testimony before the Senate Committee on Education and Labor, *op. cit.* at n. 6, pp. 2954-2977; Julius Cohen, "The 'Appropriate Unit' Under the National Labor Relations Act," 39 *Columbia Law Review* 1110 (1939).

<sup>22</sup> See the testimony of Chairman Madden before the Senate Committee on Education and Labor, *op. cit.* at n. 6, pp. 227-230; Report of the Board to the Senate Committee, *idem*, pp. 530 ff; testimony of Board Member E. S. Smith, *idem*, pp. 1569-1577; testimony of Charles Fahy, General Counsel to the Board, *idem*, pp. 2351 ff; statement of Board Member D. W. Smith to the House Committee on Labor, *op. cit.* at n. 11, pp. 2166 ff.

<sup>23</sup> National Labor Relations Board, First Annual Report (1936), p. 113; Second Annual Report (1937), pp. 122-140; Third Annual Report (1938), pp. 156 ff; Note, 32 *Illinois Law Review* 568 (1938); Louis W. Koenig, "The National Labor Relations Act—An Appraisal," 23 *Cornell Law Quarterly* 392 (1938); William Gorham Rice, "The Determination of Employee Representatives," 5 *Law and Contemporary Problems* 2 (1938), p. 188; William Stix, "The Appropriate Bargaining Unit Under the Wagner Act," 23 *Washington Law Quarterly* 156 (1938); Note, 12 *Wisconsin Law*

bargaining through the selection of the optimum<sup>24</sup> units for that purpose.<sup>25</sup> In the absence of an inter-union contest, the choice of the petitioner generally prevailed.<sup>26</sup> Neither the employer nor employer-dominated organizations were successful in opposing the desires of bona fide unions.<sup>27</sup>

When confronted, however, with the clashing demands of national federations of labor, the Board resorted to what seems indubitably to have been a politically expedient compromise. In the *Globe Machine and Stamping Company* case<sup>28</sup> the relevant factors, *mirabile dictu*, were found to be so evenly balanced as between a small craft and a large industrial unit that it was deemed imperative to ascertain the convictions of the employees more specifically. Practically, this granted to crafts the option of inclusion in or exclusion from larger bargaining groups. In many subsequent cases,<sup>29</sup> an identical policy was applied.<sup>30</sup>

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*Review* 367 (1937); Note, 47 *Yale Law Journal* 122 (1937); Note, 38 *Columbia Law Review* 1243 (1938); "The 'Globe Rule' for Determining Appropriate Bargaining Units Under the Wagner Act," 6 *University of Chicago Law Review* 673 (1939).

<sup>24</sup> The term "optimum" implies maximum effectiveness under the immediate circumstances. The Board has set off units which admittedly were neither the most effective ultimately nor the most logical, in order to permit small groups of organized employees in largely unorganized plants to engage in collective bargaining. *Gulf Oil Corporation*, 4 N. L. R. B. 133 (1937); *Associated Press*, 5 N. L. R. B. 43 (1938); *United Shipyards, Inc.*, 5 N. L. R. B. 742 (1938); *Phelps-Dodge Corp.*, 6 N. L. R. B. 624 (1938); *Postal Telegraph Cable Co.*, 7 N. L. R. B. 444 (1938).

<sup>25</sup> Although from the very nature of the problem a certain degree of consistency is required, the Board has emphatically denied that it is bound in its unit decisions by *res adjudicata*: "A prior decision in regard to whether a certain unit of employees is appropriate for purposes of collective bargaining is a circumstance, but not a decisive one, which the Board in the exercise of a sound discretion will consider should such question again present itself in a subsequent proceeding involving the representation of such employees." *Pacific Greyhound Lines*, 9 N. L. R. B. 557 (1938).

<sup>26</sup> Testimony of E. S. Smith, Senate Committee on Education and Labor, *op. cit.* at n. 6; Julius Cohen, "The 'Appropriate Unit' Under the National Labor Relations Act," 39 *Columbia Law Review* 1110 (1939), at p. 1137.

<sup>27</sup> Note, 32 *Illinois Law Review* 568 (1938).

<sup>28</sup> 3 N. L. R. B. 294 (1937).

<sup>29</sup> The cases in which the Globe Doctrine was applied are set out by Cohen, *op. cit.* at n. 26, p. 1130, footnote 79. See also National Labor Relations Board, Fourth Annual Report (1939), p. 86.

<sup>30</sup> It has been pointed out that in these cases "the Board has talked in terms of the standards employed in the non-controversial cases, but other considerations seem to have been determinative." Note, 47 *Yale Law Journal* 122 (1937).

The reaction was not slow in coming. The C. I. O. accused the Board of sabotaging the purposes of the Act.<sup>31</sup> Edwin S. Smith, in a series of dissenting opinions, charged his associates with "abandoning the necessary judicial function under the Act of making a reasonable determination of the appropriate bargaining unit in accordance with the facts of the particular case."<sup>32</sup> Mr. Smith believed that permitting the separation of strategic crafts from the main body of the employees would drastically curtail the ability of the latter to exert the economic pressure often necessary to secure collective bargaining rights. Even the American Federation of Labor, to whose benefit the Globe doctrine undoubtedly redounded,<sup>33</sup> registered its dissatisfaction.<sup>34</sup>

The appointment of William Leiserson to the Board in 1939 resulted in a reopening of the entire question of unit procedure. Mr. Leiserson advanced the theory that the Board does not have "the authority to set aside an appropriate unit . . . established by negotiation between the legally authorized representative of the employees and their employers and maintained in contracts between

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<sup>31</sup> *Supra*, n. 20.

<sup>32</sup> Allis Chalmers Manufacturing Co., 4 N. L. R. B. 159 (1937). Mr. Smith listed his subsequent dissents in his testimony before the Senate Committee on Education and Labor, *op. cit.* at n. 6, p. 1569. To these might be added Reading Transportation Co., 10 N. L. R. B. 15 (1938); Chrysler Corporation, 13 N. L. R. B. No. 121 (1939); Briggs Manufacturing Co., 13 N. L. R. B. No. 123 (1939); National Can Co., 13 N. L. R. B. No. 124 (1939); Buckley Hemlock Mills, 15 N. L. R. B. No. 54 (1939); Van Camp's Inc., 15 N. L. R. B. No. 99 (1939); Toledo Steel Tube Co., 15 N. L. R. B. No. 95 (1939); L. B. Lockwood Co., 16 N. L. R. B. No. 11 (1939); B. F. Goodrich Co., 16 N. L. R. B. No. 17 (1939); Chicago Malleable Castings Co., 16 N. L. R. B. No. 9 (1939); Western Pipe and Steel Co., 17 N. L. R. B. R-2337 (1939); Colorado Builder's Supply Co., 18 N. L. R. B. R-2364 (1939).

<sup>33</sup> Note, 38 *Columbia Law Review* 1243 (1938): "The N. L. R. B.'s unit policy . . . [has] favored the A. F. of L. . . ."; Note, 32 *Illinois Law Review* 568 (1938): "It cannot be doubted that this is highly favorable to the A. F. of L. . . ."; Note, 47 *Yale Law Journal* 122 (1937): "Several recent decisions have given even greater aid to the Federation . . . . Implicit in such a decision—one which the A. F. of L. has sought to insert into the National Labor Relations Act by amendment—is a determination in favor of the craft form of organization . . . ."

<sup>34</sup> The A. F. of L. objected to the fact that the Board was not absolutely bound to permit crafts to segregate themselves. "It need only conclude that the considerations are not equal . . . and thereby the workers are denied the chance to vote. In other words, the Globe Doctrine means that the workers vote when the Board permits them to vote." Testimony of Pres. Wm. Green before the House Committee on Labor, *op. cit.* at n. 11, p. 645.

them."<sup>35</sup> Further, in the interests of stability, he contended that a strict doctrine of *res adjudicata* as to units should prevail.<sup>36</sup> Where, however, no previous contract existed, Mr. Leiserson insisted that crafts or other less inclusive groups be automatically excepted from the larger group, if they so desired.<sup>37</sup>

Chairman Madden and Board Member Edwin S. Smith adhered to their previous positions, the former advocating the Globe doctrine and the latter a strict policy of inquiry into the effects of divided units upon the bargaining strength of workers. The result was a series of divided decisions. Where the previous history of collective bargaining indicated an industrial unit, Messrs. Leiserson and Smith prevailed over Chairman Madden.<sup>38</sup> Where there had been some

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<sup>35</sup> Dissenting opinion in West Coast Wood Preserving Co., 15 N. L. R. B. No. 1 (1939). See also his opinions in American Can Co., 13 N. L. R. B. No. 126 (1939); Milton Bradley Co., 15 N. L. R. B. No. 105 (1939); Globe Newspaper Co., 15 N. L. R. B. No. 106 (1939); Clyde Mallory Lines, 15 N. L. R. B. No. 111 (1939); Iowa Southern Utilities Co., 15 N. L. R. B. No. 62 (1939); Hatboro Foundry Co., 16 N. L. R. B. No. 78 (1939). The majority of the Board strenuously disagrees with this principle. See Clyde Mallory Lines, 15 N. L. R. B. No. 111 (1939); Todd-Johnson Dry Docks Inc., 18 N. L. R. B. R-2464 (1939).

<sup>36</sup> Globe Newspaper Co., 15 N. L. R. B. No. 106 (1939); Bendix Products Corp., 15 N. L. R. B. No. 107 (1939) ("When the Board, after due investigation and hearing, has determined that all the hourly paid production employees of the Company constitute an appropriate unit, I am of the opinion that it is not free in subsequent proceedings to find the same unit inappropriate or to disregard it").

<sup>37</sup> In Pittsburgh Plate Glass Co., 15 N. L. R. B. No. 58 (1939), Mr. Leiserson was of the opinion that the one of six separate plants of the same company that failed to record a majority for the union should be excepted from the employer unit, maintaining that its inclusion was not "essentially different from the denial of free choice of representation in cases where employers impose labor organizations on their employees." Similarly, Boston Globe Co., 15 N. L. R. B. No. 106 (1939). In Toledo Steel Tube Co., 15 N. L. R. B. No. 95 (1939), it was his position that since "No so-called industrial unit including tool and die makers has been established by custom, practice, or contract between duly designated representatives of the employees and the employer," the tool and die makers should be certified without the Globe procedure. Similarly, Willys Overland Co., 15 N. L. R. B. No. 98 (1939); Armour & Co., 16 N. L. R. B. No. 38 (1939); Long-Bell Lumber Co., 16 N. L. R. B. No. 74 (1939).

Despite a general belief to the contrary, the Leiserson rule is actually favorable to industrial unionism, since crafts may combine to bargain together, while an industrial group could not be broken up. See "Labor Relations Board Disagreement Over Appropriate Employee Bargaining Unit," 49 *Yale Law Journal* 339 (1939).

<sup>38</sup> American Can Co., 13 N. L. R. B. No. 126 (1939); West Coast Wood Preserving Co., 15 N. L. R. B. No. 1 (1939); Milton Bradley Co., 15

showing of previous contractual relations on a craft basis, or no previous contracts at all, but where a craft unit might have impaired the employees' bargaining power, Chairman Madden voted for the Globe doctrine with the concurrence of Mr. Leiserson but against the wishes of Mr. Smith.<sup>39</sup> In several cases Mr. Smith agreed to the application of the Globe procedure where there was a definite history of bargaining on a craft basis.<sup>40</sup> Finally, where the various objective factors pointed to an industrial unit, in spite of past contractual relationships on a less inclusive basis, Messrs. Smith and Madden agreed upon the industrial unit, with Mr. Leiserson in dissent.<sup>41</sup> At the present writing, the final outcome of these confusing shifts in the balance of power is not clear, but it is certain that unification of the labor movement would reduce the entire question to a matter of routine.<sup>42</sup>

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N. L. R. B. No. 105 (1939); Bendix Products Corp., 15 N. L. R. B. No. 107 (1939); Roberts & Manders Stove Co., 16 N. L. R. B. No. 78 (1939); Todd-Johnson Dry Docks Inc., 18 N. L. R. B. No. R-2464 (1939); Celanese Corporation, 18 N. L. R. B. No. 104 (1939). While agreeing with Mr. Leiserson on the industrial unit in these cases, Mr. Smith made it plain that he did not subscribe to Mr. Leiserson's status quo theory: "I cannot see wherein a finding by the Board, fixing a different appropriate unit from that embodied in a previous contract which admittedly is no bar to a certification of representatives, involves any issue of contractual obligations or the setting aside of contractual provisions." In the American Can Co. case, Chairman Madden also enunciated his opposition on this point, largely on the ground that the fixing of units was an evolutionary process, not to be stratified by administrative ruling.

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<sup>39</sup> Van Camp's Inc., 15 N. L. R. B. No. 99 (1939); Toledo Steel Tube Co., 15 N. L. R. B. No. 95 (1939); Walgreen Co., 15 N. L. R. B. No. 109 (1939); L. B. Lockwood Co., 16 N. L. R. B. No. 11 (1939); B. F. Goodrich Co., 16 N. L. R. B. No. 17 (1939); Chicago Malleable Casting Co., 16 N. L. R. B. No. 9 (1939); Long-Bell Lumber Co., 16 N. L. R. B. No. 74 (1939); Weyerhaeuser Timber Co., 16 N. L. R. B. No. 75 (1939). It is to be noted, however, that Mr. Leiserson favored immediate certification of the craft units in these cases, rather than the application of the Globe doctrine principles.

<sup>40</sup> Willy's Overland Motors Inc., 15 N. L. R. B. No. 98 (1939); Armour & Co., 16 N. L. R. B. No. 38 (1939).

<sup>41</sup> Boston Globe Newspaper Co., 15 N. L. R. B. No. 106 (1939); Pittsburgh Plate Glass Co., 15 N. L. R. B. No. 58 (1939); Clyde Mallory Lines, 15 N. L. R. B. No. 111 (1939).

<sup>42</sup> See Chain Belt Co., 17 N. L. R. B. No. 8 (1939), for an example of the compromise of theoretical differences in the absence of rival claimants.

## C. ELECTION AND CERTIFICATION

The appropriate unit selected, the Board proceeds to its determination of bargaining representatives. In rival union cases it was reluctant to certify without an election by secret ballot,<sup>43</sup> a reluctance that subsequently hardened into fixed policy with the advent of Mr. Leiserson.<sup>44</sup>

In preparing the ballot, the Board has excluded employer-dominated unions previously established as such by proceedings under Section 10 of the Act.<sup>45</sup> The practice with regard to the provision of a space for voting against either or all organizations named on the ballot has varied. In the earlier elections, the voter was denied this privilege. In *American France Line*,<sup>46</sup> however, the Board amended the original ballot to provide an additional space wherein the voter might express his opposition to both the competing unions.<sup>47</sup> It was pointed out<sup>48</sup> that the shift from a "majority of eligible votes" to a "majority of those voting"<sup>49</sup> rendered this change a logical necessity, for "if the opportunity of voting against the organizations named on the ballot were denied, a majority might be forced against its will to accept representation by one or other of the nominees," since "those not voting would be presumed to acquiesce in the choice of the majority who do vote, and thus the employee who does not desire to be represented by either designated union would not express this preference by refraining from voting."<sup>50</sup>

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<sup>43</sup> "Proof which would normally warrant the conclusion that a labor organization represents a majority of the employees within the appropriate unit has been held inadequate in a number of cases in which a rival organization has presented evidence showing a conflicting claim concerning the representation of employees." National Labor Relations Board, Third Annual Report (1938), p. 155. For a good example, see *Fisher Body Corporation*, 7 N. L. R. B. 1083 (1938).

<sup>44</sup> *Cudahy Packing Co.*, 13 N. L. R. B. No. 61 (1939). See, however, *Jamestown Metal Equipment Co., Inc.*, 17 N. L. R. B. No. 71 (1939).

<sup>45</sup> National Labor Relations Board, Third Annual Report (1938), p. 144, note 4. However, employer aided A. F. of L. unions have not been thus disqualified. See 38 *Columbia Law Review* 1243 (1939), notes 125-127.

<sup>46</sup> 3 N. L. R. B. 64 (1937).

<sup>47</sup> However, certifications rendered pursuant to elections in which the "or neither" option was not given are not invalid, the Board holding that this procedure may be employed under the Act. *Charles Cushman Co.*, 15 N. L. R. B. No. 15 (1939).

<sup>48</sup> *Interlake Iron Corporation*, 4 N. L. R. B. 55 (1937).

<sup>49</sup> See *infra*, pp. 252.

<sup>50</sup> *Interlake Iron Corporation*, 4 N. L. R. B. 55 (1937).

Section 9(a) of the National Labor Relations Act specifies that "the majority of the employees in a unit" shall select the exclusive bargaining representatives. The term "majority" has been subject to diverse construction. In all cases arising prior to July 1, 1936, a majority of all employees eligible to vote was required for certification.<sup>51</sup> Subsequently, influenced by the decision of the United States Circuit Court of Appeals in the *Virginia Railway* case,<sup>52</sup> the Board adopted a more liberal policy by deeming sufficient a majority of those employees actually voting, provided that a majority of those eligible to vote had done so.<sup>53</sup> The final step was to certify upon the basis of a majority of those voting regardless of the extent of participation of those eligible to vote.<sup>54</sup> The Board reasoned that minorities,

by peacefully refraining from voting could prevent certification of organizations which they could not defeat in an election. Even where their strength was insufficient to make a peaceful boycott effective, such minority organizations by waging a campaign of terrorism and intimidation could keep enough employees from participating to thwart certification. The 'quorum' interpretation thus introduces a qualification that places in the hands of employers and rival labor organizations a weapon which may easily defeat the collective bargaining sections of the Act.<sup>55</sup>

The latter interpretation, however, might yield unfair results where the number of employees participating in an election constitutes but a negligible fraction of the whole. Professor Rice observes that organizations receiving as few as 20 percent of the eligible votes have been certified,<sup>56</sup> and believes that an even lower per-

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<sup>51</sup> National Labor Relations Board, First Annual Report (1936), p. 108. For instance, in *Chrysler Corporation*, 1 N. L. R. B. 164 (1936), where only 125 out of 750 eligibles voted, the Board refused to certify.

<sup>52</sup> *Virginia Railway Co. v. System Federation* No. 40, 84 Fed. (2d) 641, *aff'd*, 300 U. S. 515 (1937).

<sup>53</sup> *Associated Press*, 1 N. L. R. B. 686 (1936); *Luckenbach S. S. Co.*, 2 N. L. R. B. 181 (1936).

<sup>54</sup> *R. C. A. Manufacturing Co.*, 2 N. L. R. B. 159 (1936).

<sup>55</sup> *Idem*.

<sup>56</sup> William Gorham Rice, 5 *Law and Contemporary Problems* 188 (1938). To the cases he cites therein might be added *New York Handkerchief Co.*, 7 N. L. R. B. 624 (1938), where certification was granted to a union receiving 23% of the total eligible votes, with only 25% of the eligible employees participating in the election.

centage might be acceptable, particularly where there is evidence of coercion or intimidation by the employer or a rival union.<sup>57</sup>

If neither of two competing unions receives a majority of the votes cast, additional complications ensue. In this situation, provided that a majority of the voters have expressed a preference in favor of collective bargaining, the Board permits the organization receiving a plurality of the votes cast to secure a new election.<sup>58</sup> However, only the petitioner's name appears on the ballot, the voter merely registering his "yea" or "nay" on the proposition of representation by the stated organization. Mr. Edwin S. Smith averred that in the absence of a majority the "or neither" votes, even though constituting a plurality, should be disregarded, thus permitting the certification of the consequent majority group, if there is such,<sup>59</sup> but the majority of the Board refused to adopt his suggestion.

When there were more than two competing unions, and none received a majority, the Board instituted the practice of "conducting successive run-off elections eliminating from each successive ballot the organization receiving the lowest number of votes in the preceding ballot until either a representative has been selected by a majority or a majority has signified that none of the contesting organizations is desired as a representative for collective bargaining."<sup>60</sup>

Again, Mr. Leiserson's advent led to some discussion of this procedure. It was his contention that

Congress might have provided that in all such cases a plurality shall prevail, but it saw fit not to authorize certification on a plurality vote. Con-

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<sup>57</sup> In the Hearings before the House Committee on Labor, *op. cit.* at n. 11, p. 1050, Congressman Barton attempted to elicit from Mr. Fahy, the Board's counsel, a statement as to what percentage of the total eligible voters must participate in an election in order to validate it. Mr. Fahy replied that it was difficult to fix a definite dividing line, indicating that the number fluctuates, depending upon the circumstances in each case.

<sup>58</sup> *Zellerbach Co.*, 4 N. L. R. B. 348 (1937), and many subsequent cases.

<sup>59</sup> *Interlake Iron Corporation*, 4 N. L. R. B. 55 (1937): "Under such an arrangement these ["or neither"] ballots would merely have filled the role of indicating to the Board that less than a majority of those voting do not desire to be represented by either labor organization. The wishes of this minority should then properly be held ineffective to prevent a choice of representative by the majority of the employees who desire representation by one of the contending agencies."

<sup>60</sup> *Aluminum Company of America*, 12 N. L. R. B. 237 (1939).

gress might also have provided that whenever there are more than two candidates the voters shall indicate their first and second choices and that a majority should be calculated on the basis of the second-choice votes. If this were done no run-off election would be necessary. But Congress did not see fit to adopt this device. The so-called run-off election is merely an alternative method of indicating second choices. If Congress did not authorize the first method, I cannot see how it can be assumed that the alternative method is justified.<sup>61</sup>

Other suggestions were advanced from responsible sources. Judge Padway, of the American Federation of Labor, maintained that the run-off ballot should contain the names of all contesting organizations, without the "or neither" option, but protecting the employees who desire no bargaining agent, and those who prefer no bargaining agent if their own union is defeated, by requiring as a prerequisite to certification a number of votes equal to a majority of the votes cast at the first election.<sup>62</sup> The International Juridical Association suggested that employees voting for "neither" of the contestants be instructed to indicate their preference as between the contestants, these votes to be counted only in the event that the "or neither" votes failed to constitute a majority.<sup>63</sup> The majority of the Board, however, has thus far adhered to its original practice in this regard.

Procedure in case of tie votes has not been uniform. In an early case, where each contestant received an equal number of votes, a re-election was ordered on the same terms as the first,<sup>64</sup> but in a later case the representation petition was dismissed.<sup>65</sup>

Elections have been invalidated under the following circumstances: (a) employer interference which may have distorted the

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<sup>61</sup> Coos Bay Lumber Co., 16 N. L. R. B. No. 50 (1939). See also his dissents in Selby Shoe Co., 16 N. L. R. B. No. 49 (1939); Armour & Co., 16 N. L. R. B. No. 38 (1939).

<sup>62</sup> Testimony before the Senate Committee on Education and Labor, *op. cit.* at n. 6, pp. 836-838.

<sup>63</sup> "Run-Offs in N. L. R. B. Elections," 8 *I. J. A. Bulletin* No. 3 (1939).

<sup>64</sup> Shell Oil Co., 8 N. L. R. B. 920 (1938). The Oil Workers Union received 26 votes, the International Union of Boilermakers 26, while 9 votes were cast for neither. Both organizations requested a run-off. In granting the request, the Board specified: "The ballot used will be the same in all respects as in the previous election, the second election being held for the sole purpose of recording the results of any possible change of position or additional participation on the part of eligible employees."

<sup>65</sup> Walworth Co., 15 N. L. R. B. No. 7 (1939). The S. W. O. C. received 18 votes, the Pattern Makers League 18, while 4 were cast for neither organization.

outcome;<sup>66</sup> (b) modification by the Board of the unit originally designated as appropriate;<sup>67</sup> (c) shift in the sentiment of the majority of the employees, as evidenced by the submission of signed membership cards subsequent to the election but prior to formal certification;<sup>68</sup> (d) violation of the secrecy of the ballot due to neglect on the part of the Board's agent;<sup>69</sup> (e) lengthy delay between the date of election and final decision.<sup>70</sup> Consent elections have been treated as legitimate means of ascertaining employee representatives,<sup>71</sup> unless they failed to conform in every particular with the electoral regulations of the Board.<sup>72</sup> Such an election was set aside and a new one ordered when a majority of the employees, by petition, indicated a desire to be represented by a union other than that first chosen.<sup>73</sup> However, elections called and conducted by employers have not been deemed conclusive because, notwithstanding the purity of the motivation and the impeccability of the mechanics of the ballot, the Board felt that the opportunity for coercive activity, in a form difficult to discover, was present.<sup>74</sup>

The Board refused to set aside an election between a nationally affiliated union and an independent organization where, after the latter had won, the former brought charges of employer domination against it. Without conceding that the agreement to hold the election precluded it from investigating the charges, the Board held that

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<sup>66</sup> Carrolton Metal Products Corp., 6 N. L. R. B. 569 (1938) (employer threatened to shut down if one of competing unions won); United Carbon Co., 7 N. L. R. B. 598 (1938); Industrial Rayon Corp., 7 N. L. R. B. 877 (1938); Paragon Rubber Co., 7 N. L. R. B. 965 (1938); Tennessee Copper Co., 8 N. L. R. B. 575, 9 N. L. R. B. 117 (1938); Yale & Towne Manufacturing Co., 10 N. L. R. B. 1321 (1939) (election not voided, merely disregarded); Eagle & Phenix Mills, 11 N. L. R. B. 361 (1939); Pennsylvania Greyhound Lines, 11 N. L. R. B. 738 (1939); Connor Lumber & Land Co., 11 N. L. R. B. 776 (1939); Picker X-Ray Corporation, 12 N. L. R. B. 1384 (1939); Pacific Gas & Electric Co., 13 N. L. R. B. No. 32 (1939).

<sup>67</sup> Grace Line, 2 N. L. R. B. 369 (1937).

<sup>68</sup> New York & Cuba Mail Steamship Co., 2 N. L. R. B. 595 (1937).

<sup>69</sup> Pennsylvania Greyhound Lines, 4 N. L. R. B. 271 (1937).

<sup>70</sup> Bamberger-Reinthal Co., 9 N. L. R. B. 1057 (1938). See also Godchaux Sugars Inc., 12 N. L. R. B. 568 (1939).

<sup>71</sup> National Sugar Refining Co., 1 N. L. R. B. 276 (1937).

<sup>72</sup> S. Blechman & Sons, 4 N. L. R. B. 15 (1937); United Carbon Co., 7 N. L. R. B. 598 (1938); Minneapolis-Moline Power Implement Co., 7 N. L. R. B. 840 (1938).

<sup>73</sup> Novelty Slipper Co., 5 N. L. R. B. 264 (1938).

<sup>74</sup> J. Wiss & Sons Co., 12 N. L. R. B. 601 (1939).

since its agents, by including the independent union on the ballot, had impliedly acknowledged its capacity to act as an employee representative, effectuation of the policies of the Act required that probative effect be given to the official acts of the agents.<sup>75</sup>

Certification is of particular moment in rival union controversies, for while it is in effect the employer is deprived of any possible excuse for treating with a party other than the one certified, thus handicapping aspiring minorities.<sup>76</sup> While the regulations of the Board do not specify a definite term, its decisions point toward a one-year period as pragmatically justified.<sup>77</sup> Nevertheless, extraordinary circumstances have resulted in the implied or expressed approval of shorter<sup>78</sup> or longer<sup>79</sup> certification periods.

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<sup>75</sup> Hope Webbing Co., 14 N. L. R. B. No. 5 (1939).

<sup>76</sup> See "The Labor Board and the Courts," 32 *Illinois Law Review* 568 (1938).

<sup>77</sup> Swayne & Hoyt, Ltd., 2 N. L. R. B. 282 (1936) (certification two years previously by the National Longshoremens' Board, but election ordered); Motor Transport Co., 2 N. L. R. B. 492 (1936) (certification more than a year previously by old N. L. R. B., election ordered); Hubinger Co., 4 N. L. R. B. 428 (1937) (informal notification of result of consent election Dec. 2, 1935, new election ordered Dec. 4, 1937); Shell Oil Co., 7 N. L. R. B. 417 (1938) (certification May 24, 1937, new election ordered May 24, 1938); Aircraft Corporation, 7 N. L. R. B. 1061 (1938) (certification April 30, 1937, new election ordered June 27, 1938); New York & Cuba Mail Steamship Co., 9 N. L. R. B. 51 (1938) (the Board, on Oct. 5, 1938, stated "Since this certification was issued on August 14, 1937 it no longer offers any bar to a new choice of representatives."); Todd-Johnson Dry Docks Inc., 10 N. L. R. B. 629 (1938) ("Since more than a year has elapsed since the certification by the Regional Director, we feel that such certification should not in any event constitute a bar to a designation of bargaining representatives at this time"); Waterman Steamship Corp., 10 N. L. R. B. 1079 (1939); Jones Lumber Co., 12 N. L. R. B. 209 (1939); Godchaux Sugars Inc., 12 N. L. R. B. 568 (1939); Pennsylvania Greyhound Lines, 13 N. L. R. B. No. 4 (1939) (petition to set aside 16-month old certification held unnecessary); Showers Bros. Co., 13 N. L. R. B. No. 88 (1939); Westinghouse Electric & Mfg. Co., 14 N. L. R. B. No. 20 (1939); Minneapolis-Moline Power Implement Co., 14 N. L. R. B. No. 72 (1939); Whittier Mills Co., 15 N. L. R. B. No. 47 (1939); R. C. A. Mfg. Co., 16 N. L. R. B. No. 72 (1939); Wickwire Spencer Steel Co., 18 N. L. R. B. No. 54 (1939). See particularly the concurring and dissenting opinions in American Hair and Felt Co., 15 N. L. R. B. No. 61 (1939). See also, Report of N. L. R. B. to Senate Committee on Education and Labor, *op. cit.* at n. 6, p. 550; testimony of Charles Fahy before the House Committee on Labor, *op. cit.* at n. 11, p. 1046; National Labor Relations Board, Fourth Annual Report (1939), pp. 75-76.

<sup>78</sup> Showers Bros. Furniture Co., 4 N. L. R. B. 585 (1937) (dissolution of union previously certified); Socony-Vacuum Oil Co., 17 N. L. R. B.

## D. COLLECTIVE LABOR AGREEMENTS

One of the most controversial issues under this head has been the Board's practice of regarding collective agreements as no bar to representation proceedings when they were contracted under improper circumstances or embodied improper terms. The justification for ignoring contracts with employer-dominated organizations is too obvious to warrant comment.<sup>80</sup> Agreements made or renewed pending the conduct of representation proceedings were held not conclusive, lest the Board be hamstrung by hastily conceived obstacles.<sup>81</sup> Discrepancy between the coverage of a contract and the unit deemed appropriate by the Board has resulted in the disqualification of the contract.<sup>82</sup> An organization was held to have

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No. 105 (1939) (doubtful transformation of the contracting local into another organization); Newark Rivet Works, 18 N. L. R. B. No. 71 (1939) (certified union neglected to bargain, despite employer's request that it do so).

<sup>79</sup>United States Stamping Company, 5 N. L. R. B. 172 (1938). Certification was made on Feb. 11, 1936 (1 N. L. R. B. 123). On Feb. 10, 1938, the Board held: ". . . if, as we find below, the respondent refused to bargain collectively with the Union at a time when it represented a majority of the respondent's employees, we cannot recognize a designation of other representatives since that time as indicating a free expression of choice by the employees." The employer was ordered to bargain with the organization originally certified. See also the opinion of Chairman Madden in American Hair and Felt Co., 15 N. L. R. B. No. 61 (1939).

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<sup>80</sup>See William G. Rice, "The Legal Significance of Labor Contracts Under the National Labor Relations Act," 37 *Michigan Law Review* 693 (1939), at p. 705.

<sup>81</sup>American-West African Line, 4 N. L. R. B. 1086 (1938); Wilmington Transport Co., 4 N. L. R. B. 750 (1938); California Wool Scouring Co., 5 N. L. R. B. 782 (1938); Joseph S. Finch & Co., 7 N. L. R. B. 1 (1938); Tennessee Electric Power Co., 7 N. L. R. B. 24 (1938); American France Lines, 7 N. L. R. B. 79 (1938); Unit Cast Corporation, 7 N. L. R. B. 129 (1938); Pacific Lumber Inspection Bureau, Inc., 7 N. L. R. B. 529 (1938); Colonie Fibre Co., 9 N. L. R. B. 658 (1938); Monon Stone Co., 10 N. L. R. B. 64 (1938); Standard Cap and Seal Co., 10 N. L. R. B. 466 (1938); United Premier Food Stores Inc., 11 N. L. R. B. 270 (1939); American Radiator Co., 11 N. L. R. B. 1127 (1939); Hirsch Shirt Corporation, 12 N. L. R. B. 553 (1939); Joe Lowe Corp., 13 N. L. R. B. No. 76 (1939); Sloss-Sheffield Steel & Iron Co., 14 N. L. R. B. No. 13 (1939); Florence Pipe Foundry & Machine Co., 15 N. L. R. B. No. 31 (1939); Buckley Hemlock Mills Inc., 15 N. L. R. B. No. 54 (1939); Wickwire Spencer Steel Co., 18 N. L. R. B. No. 54 (1939); Silvray Lighting Inc., 18 N. L. R. B. No. 85 (1939).

<sup>82</sup>Kinnear Manufacturing Co., 4 N. L. R. B. 773 (1938) (contract included supervisory employees, Board held they should be excluded); Joseph S. Finch & Co., 7 N. L. R. B. 1 (1938) (contract was for entire

"waived its rights to assert the existence of . . . contracts as a bar to elections" by filing under Section 9(c),<sup>83</sup> while similar treatment was accorded to agreements subject to termination, either in terms or by voluntary renunciation, near the date the proceedings were initiated,<sup>84</sup> or specifically terminable "if a majority of the employees in the unit should elect other representation."<sup>85</sup> A contract entered into prior to the hiring of any employees was voided because it precluded a free choice of representatives.<sup>86</sup> The Board also decided that "The right of free choice of representatives guaranteed by the Act must prevent, at least, the renewal of a contract, even though valid during its term, if a majority of the employees wish to be represented by another collective bargaining representative at the time such renewal might become effective."<sup>87</sup>

Neither an employer nor a union may seek to interpose vague and indefinite agreements, or agreements to which the labor organi-

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plant, Board held that crafts were entitled to vote separately on representation). See also cases cited at 38 *Columbia Law Review* 1243 (1938), note 64.

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<sup>83</sup> *American France Line*, 3 N. L. R. B. 64 (1937). See also *Cote Brothers, Inc.*, 7 N. L. R. B. 70 (1938); *Postal Telegraph-Cable Corp.*, 9 N. L. R. B. 1060 (1938).

<sup>84</sup> *Black Diamond Steamship Co.*, 2 N. L. R. B. 241 (1936); *City Auto Stamping Co.*, 3 N. L. R. B. 306 (1937); *Shell Chemical Co.*, 4 N. L. R. B. 259 (1937); *Atlanta Footwear Co.*, 5 N. L. R. B. 252 (1938); *Red River Lumber Co.*, 5 N. L. R. B. 663 (1938); *Sandusky Metal Products Inc.*, 6 N. L. R. B. 12 (1938); *Martin Bros. Box Co.*, 7 N. L. R. B. 88 (1938); *Sante Fe Trails Transportation Co.*, 7 N. L. R. B. 358 (1938); *Shipowners Association of the Pacific Coast*, 7 N. L. R. B. 1002 (1938); *Broun-Saltman Furniture Co.*, 7 N. L. R. B. 1174 (1938); *Arbuckle Bros.*, 7 N. L. R. B. 1247 (1938); *Utica Knitting Co.*, 8 N. L. R. B. 783 (1938); *California Woodturning Co.*, 8 N. L. R. B. 1057 (1938); *H. Margolin & Co.*, 9 N. L. R. B. 852 (1938); *Postal-Telegraph Cable Corp.*, 9 N. L. R. B. 1060 (1938); *F. E. Booth & Co.*, 10 N. L. R. B. 1491 (1939); *Socony-Vacuum Oil Co.*, 11 N. L. R. B. 28 (1939); *Heldman-Schild-Lasser Inc.*, 11 N. L. R. B. 1289 (1939); *Kingan & Co.*, 12 N. L. R. B. 1327 (1939); *Tampa-Inter-Ocean Steamship Co.*, 13 N. L. R. B. No. 125 (1939).

<sup>85</sup> *Consolidated Aircraft Corp.*, 7 N. L. R. B. 1061 (1938); *Farr-Alpaca Co. Inc.*, 9 N. L. R. B. 1208 (1938); *Monument Mills*, 10 N. L. R. B. 347 (1938); *Novelty Slipper Co.*, 5 N. L. R. B. 264 (1938); *Red River Lumber Co.*, 5 N. L. R. B. 663 (1938); *Northwest Publications*, 9 N. L. R. B. 529 (1939).

<sup>86</sup> *Merry Shoe Co.*, 10 N. L. R. B. 457 (1938).

<sup>87</sup> *Gowanus Towing Co.*, 8 N. L. R. B. 820 (1938). See Louis W. Koenig, "The National Labor Relations Act," 23 *Cornell Law Quarterly* 392 (1938) for comment, and cases cited *supra*, note 84.

zation is not an actual party.<sup>88</sup> Oral contracts, while not necessarily falling within these categories,<sup>89</sup> have thus been construed.<sup>90</sup> Compacts for members only, since they do not "constitute compliance with the [employer's] duty to bargain collectively within the meaning of Section 8(5) of the Act," can not preclude the Board from investigating and certifying exclusive representatives.<sup>91</sup> A similar conclusion has been reached regarding pacts with minorities and organizations of questionable majority status,<sup>92</sup> and agreements "which in terms anticipate Board action, [and] contracts . . . for less than the employees' full rights under the act."<sup>93</sup> A contract

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<sup>88</sup> New England Transportation Co., 1 N. L. R. B. 130 (1936).

<sup>89</sup> Century Woven Label Co., 8 N. L. R. B. 665 (1938).

<sup>90</sup> Seiss Manufacturing Co., 7 N. L. R. B. 481 (1938) ("In view of the indefinite term and character of the alleged oral agreement, it cannot in any event preclude an investigation and determination of representatives by the Board.") The tenor of Electric Vacuum Cleaner Corp., 8 N. L. R. B. 112 (1938) tends to support the instant conclusion. Also, South Atlantic Steamship Co., 12 N. L. R. B. 1367 (1939); Mason Manufacturing Co., 15 N. L. R. B. No. 38 (1939).

<sup>91</sup> Serrick Corp., 8 N. L. R. B. 621 (1938). Similarly: City Auto Stamping Co., 3 N. L. R. B. 306 (1937); General Mills Inc., 3 N. L. R. B. 730 (1937); Northrop Corp., 3 N. L. R. B. 228 (1937); Pennsylvania Greyhound Lines, 3 N. L. R. B. 622 (1937); Zellerbach Paper Co., 4 N. L. R. B. 348 (1937); McKesson & Robbins, Inc., 5 N. L. R. B. 70 (1938); Horton Mfg. Co., 6 N. L. R. B. 2 (1938) and 7 N. L. R. B. 577 (1938); Diamond Iron Works, 6 N. L. R. B. 94 (1938); Unit Cast Corporation, 7 N. L. R. B. 129 (1938); Pressed Steel Car Co., 7 N. L. R. B. 1099 (1938); Santa Fe Trails, 7 N. L. R. B. 358 (1938); Fisher Body Corporation, 7 N. L. R. B. 1083 (1938); Tennessee Electric Co., 7 N. L. R. B. 24 (1938); American Tobacco Co., 9 N. L. R. B. 579 (1938); Aluminum Co. of America, 9 N. L. R. B. 944 (1938); Reading Transportation Co., 10 N. L. R. B. 15 (1938); White Sewing Machine Co., 10 N. L. R. B. 802 (1938); Socony-Vacuum Oil Co., 11 N. L. R. B. 28 (1939); Gemmer Manufacturing Co., 12 N. L. R. B. 584 (1939); North American Aviation Inc., 13 N. L. R. B. No. 107 (1939); Friday Harbor Canning Co., 15 N. L. R. B. No. 115 (1939). See Rice, *op. cit.* at n. 80, p. 709.

<sup>92</sup> Panama Railroad Co., 2 N. L. R. B. 290 (1936); Charles Cushman Co., 2 N. L. R. B. 1015 (1937); Interlake Iron Corporation, 2 N. L. R. B. 1036 (1937); Southern Chemical Cotton Co., 3 N. L. R. B. 869 (1937); Friedman-Blau-Farber Co., 4 N. L. R. B. 151 (1937); Mine B Coal Co., 4 N. L. R. B. 316 (1937); Lenox Shoe Co., 4 N. L. R. B. 372 (1937); Pacific Greyhound Lines, 4 N. L. R. B. 520 (1937); American-West African Line, 4 N. L. R. B. 1086 (1938); American France Line, 7 N. L. R. B. 79 (1938); Mt. Vernon Car Manufacturing Co., 11 N. L. R. B. 500 (1938); Stratbury Manufacturing Co., 12 N. L. R. B. 618 (1939); Princely Products Co., 15 N. L. R. B. No. 44 (1939). See Rice *op. cit.* at n. 80, p. 707.

<sup>93</sup> See 38 *Columbia Law Review* 1243, 1249 (1938), cases cited in footnotes 45 and 47 therein.

with an inactive union was not allowed to thwart the legitimate bargaining demands of employees.<sup>94</sup> A contract with a local union that had split into two factions was disregarded because of the fear that the resultant confusion might delay collective bargaining.<sup>95</sup> Finally, otherwise valid agreements have been discounted where the Board regarded their durations as excessive.<sup>96</sup>

The question of duration of contracts was subjected to a thorough reconsideration upon the coming of Mr. Leiserson. The case of *American Hair and Felt Co.*<sup>97</sup> involved the interesting question of whether an A. F. of L. contract, entered into soon after certification and extended for a nine-month period after only nine months had elapsed, barred an election after a period of one year from the date of certification. Chairman Madden ruled that, since at the time the extension was made the employer was unaware of the claims of a rival C. I. O. union, no election should be held until the expiration of the supplementary agreement. Mr. Leiserson concurred in the dismissal of the petition, but only because the C. I. O. presented no substantial evidence of a change of heart on the part of the employees, indicating that such a showing would have swung his vote

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<sup>94</sup> *Sound Timber Co.*, 8 N. L. R. B. 844 (1938).

<sup>95</sup> *Brewster Aeronautical Corporation*, 14 N. L. R. B. No. 79 (1939); *Midland Steel Products Co.*, 17 N. L. R. B. No. 84 (1939).

<sup>96</sup> The Board has not directly specified what it regarded as excessive, but its decisions point to one year, under ordinary circumstances, as the upper limit: *Superior Electric Co.*, 6 N. L. R. B. 19 (1938) (one year contract—"The duration of the contract is not for such a long period as to be contrary to the policies or purposes of the Act"); *Columbia Broadcasting System*, 8 N. L. R. B. 508 (1938) ("we are of the opinion that it would be contrary to the policies and purposes of the Act to refuse to order an election or certify representatives on the basis of a contract which has already been in effect for a period of more than a year."). Contracts for more than a year have been disregarded, *Hubinger Co.*, 4 N. L. R. B. 428 (1938), or expressly denounced, *Metro-Goldwyn-Mayer*, 7 N. L. R. B. 662 (1938) (five year contract). Also, *Todd-Johnson Dry Docks Inc.*, 10 N. L. R. B. 629 (1938); *Locke Insulator Corp.*, 13 N. L. R. B. No. 70 (1939); *I. Miller & Sons*, 13 N. L. R. B. No. 78 (1939). However, in *National Sugar Refining Co.*, 10 N. L. R. B. 1410 (1939), the Board refused to hold an election because a contract which had been signed more than a year previously, and renewed for one year some six months previously, was still in effect. Mr. Smith dissented on the ground that "a year having elapsed, to deny employees opportunity to exercise the right to change bargaining representatives when there is a substantial showing of a change of sentiment is an action which . . . runs counter both to the intent of the statute and the constitutional theory on which it is based."

<sup>97</sup> 15 N. L. R. B. No. 61 (1939).

the other way.<sup>98</sup> Mr. Smith dissented along the same lines as his dissent in the *National Sugar* case. The net result appears to be the strong affirmation of a strict one-year rule, with the Board under the duty of conducting annual elections upon proper showing of the need therefor.

Where collective agreements did not run counter to any of the above interdictions, they were held to preclude the initiation of representation proceedings on the ground that there existed no question concerning representation.<sup>99</sup> This marked a retreat from the formerly held substitutionary theory of contract, whereby the Board had expressly followed the National Mediation Board when it stated that the "whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of the employees to change their representatives, while at the same time continuing the existing agreements under which the representatives must function."<sup>100</sup> The change was emphasized by the Board's insistence upon the importance of determining the employee representatives by the tentative termination date of an existing contract, "so that the right to terminate the contract, if desired, shall be established by that time";<sup>101</sup> for, were substitution possible, there would seem to be no pressing need for then establishing that right.<sup>102</sup>

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<sup>98</sup> *Idem*: "More than a year has elapsed since that election, and I can see no reason for denying the employees the right given them by Congress to change their representatives at any time that a majority of them indicate they want another organization to represent them."

<sup>99</sup> *Superior Electric Co.*, 6 N. L. R. B. 19 (1938); *Cudahy Packing Co.*, 4 N. L. R. B. 39 (1937); *Godchaux Sugars Inc.*, 12 N. L. R. B. 568 (1939). See also the unreported cases of *Kelley's Creek Coal Co.* (IX-R-260) and *Wyatt Coal Co.*, (IX-R-284), described at the Hearings before the House Committee on Labor, *op. cit.* at n. 11, p. 1104.

<sup>100</sup> *New England Transportation Co.*, 1 N. L. R. B. 130 (1936). Also, *Black Diamond Steamship Co.*, 2 N. L. R. B. 241 (1936); *Swayne & Hoyt, Ltd.*, 2 N. L. R. B. 282 (1936). Cf. *Novelty Slipper Co.*, 6 N. L. R. B. 264 (1938). For criticism of this doctrine, see 38 *Columbia Law Review* 1243, 1250 (1938); Rice, *op. cit.* at n. 80, p. 720.

<sup>101</sup> *Gowanus Towing Co.*, 8 N. L. R. B. 820 (1938). See Rice, *op. cit.* at n. 80, p. 721. The Board, however, does not now explain the fate of a continuing agreement in the event that the bargaining representative changes.

<sup>102</sup> To the argument that the Board was merely concerned lest an unrepresentative agency bind the employees to unfavorable terms and conditions of employment, the Board itself advanced sufficient rebuttal: "The right of free choice of representatives guaranteed by the Act must prevent, at least, the renewal of a contract, even though valid during its

The closely related question of whether or not the National Labor Relations Board was justified in assuming the authority to order the abrogation of collective agreements has achieved a prominence surpassing that attained by any other phase of its manifold activities.<sup>103</sup> It should be noted that while an order effecting the discontinuance of an agreement is promulgated only following proceedings pursuant to Section 10 of the Act,<sup>104</sup> proceedings under Section 9, by leading to change of representation, may accomplish virtually the same result.

The simplest case is that of a closed-shop contract with an organization which the Board finds did not represent<sup>105</sup> the employees when the agreement was reached. It seems clear that since the protection of the proviso to Section 8(3) of the Act is thus withdrawn, "the Board's duty is so precise and unequivocal under the act that it is difficult to understand how it could be contended that the Board has no power to make appropriate remedial orders."<sup>106</sup> It is

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term, if a majority of the employees wish to be represented by another collective bargaining representative at the time such renewal might become effective." *Gowanus Towing Co.*, 8 N. L. R. B. 820 (1938). It is to be noted that the chief emphasis is upon the *right* to change representatives, one which the Board has considered to be an integral part of Section 7 of the Act.

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<sup>103</sup> The A. F. of L. has made this issue the spearhead of its attack upon the Board, as its testimony before the House and Senate Committees considering amendments to the Wagner Act abundantly attests.

<sup>104</sup> Typically, the order enjoins the employer from "giving effect to its June 9, 1937, closed shop contract with the International Association of Machinists." *Zenite Metal Corp.*, 5 N. L. R. B. 509 (1938).

<sup>105</sup> *i.e.*, according to the provisions of Section 9(a) of the Act.

<sup>106</sup> National Labor Relations Board, Third Annual Report (1938), p. 6. Employers have been ordered to cease and desist from giving effect to closed-shop, preferential-shop, or exclusive-bargaining contracts with nationally affiliated unions in the following cases: *Canadian Fur Trappers Corp.*, 3 N. L. R. B. 580 (1937); *National Electric Products Corp.*, 3 N. L. R. B. 475 (1937); *Lenox Shoe Co.*, 4 N. L. R. B. 372 (1937); *National Motor Bearing Co.*, 5 N. L. R. B. 409 (1938); *Zenite Metal Corp.*, 5 N. L. R. B. 509 (1938); *Missouri-Arkansas Coach Lines*, 7 N. L. R. B. 186 (1938); *Jacob A. Hunkele*, 7 N. L. R. B. 1276 (1938); *Electric Vacuum Cleaner Corp.*, 8 N. L. R. B. 112 (1938); *Jefferson Electric Co.*, 8 N. L. R. B. 284 (1938); *Ward Baking Co.*, 8 N. L. R. B. 558 (1938); *Serrick Corporation*, 8 N. L. R. B. 621 (1938); *Cowell Portland Cement Co.*, 8 N. L. R. B. 1020 (1938); *Mine B Coal Co.*, 8 N. L. R. B. 1155 (1938); *National Tea Co.*, 9 N. L. R. B. 161 (1938); *Connor Land & Lumber Co.*, 10 N. L. R. B. 831 (1939); *Mt. Vernon Car Manufacturing Co.*, 11 N. L. R. B. 500 (1939); *Pilot Radio Corp.*, 14 N. L. R. B. No. 83 (1939); *Eagle-Picher Mining Co.*, 16 N. L. R. B.

interesting to note that although the Board has made no distinction in principle between "company" unions and employer-aided "independent" unions in determining the validity of such agreements, it has, by its different treatment of the two,<sup>107</sup> suggested the fundamental dissimilarity that seems to have been recognized by the Supreme Court of the United States.<sup>108</sup>

No. 71 (1939); Monticello Manufacturing Corp., 17 N. L. R. B. No. 109 (1939); Electric Vacuum Cleaner Corp., 18 N. L. R. B. No. R-2433 (1939). For discussion of these cases, see Senate Hearings, *op cit.* at n. 6, pp. 514-605, 654, 655, 1549, 2323, 2329, 2771 *ff*; House Hearings, *op. cit.* at n. 11, pp. 452, 747.

Contracts with nationally affiliated unions were disregarded in the following representation cases: Southern Chemical Cotton Co., 3 N. L. R. B. 869 (1937); Mine B. Coal Co., 4 N. L. R. B. 316 (1937); West African Line, 4 N. L. R. B. 1086 (1938); McKesson & Robbins, Inc., 5 N. L. R. B. 70 (1938); California Wool Scouring Co., 5 N. L. R. B. 782 (1938); Pacific Greyhound Lines, 9 N. L. R. B. 557 (1938); Monon Stone Co., 10 N. L. R. B. 64 (1938); Standard Cap & Seal Co., 10 N. L. R. B. 466 (1938); Todd-Johnson Dry Docks Inc., 10 N. L. R. B. 629 (1938); American-France Line, 7 N. L. R. B. 79 (1938); Federal Knitting Mills, 3 N. L. R. B. 257 (1937); F. E. Booth & Co., 10 N. L. R. B. 1491 (1939); Union Premier Food Stores, 11 N. L. R. B. 270 (1939); Connor Lumber & Land Co., 11 N. L. R. B. 776 (1939); Heldman-Schild-Lasser Inc., 11 N. L. R. B. 1289 (1939); Hirsch Shirt Corp., 12 N. L. R. B. 553 (1939); J. Wiss & Sons Co., 12 N. L. R. B. 601 (1939); Stratbury Manufacturing Co., 12 N. L. R. B. 618 (1939); M. & J. Tracy Inc., 12 N. L. R. B. 936 (1939); Kingan & Co., 12 N. L. R. B. 1327 (1939); Locke Insulator Corp., 13 N. L. R. B. No. 70 (1939); Joe Lowe Corp., 13 N. L. R. B. No. 76 (1939); I. Miller & Sons, 13 N. L. R. B. No. 78 (1939); North American Aviation Inc., 13 N. L. R. B. No. 107 (1939); Sloss-Sheffield Steel & Iron Co., 14 N. L. R. B. No. 13 (1939); Minneapolis-Moline Power Implement Co., 14 N. L. R. B. No. 72 (1939); Brewster Aeronautical Corp., 14 N. L. R. B. No. 79 (1939); Florence Pipe Foundry & Machine Co., 15 N. L. R. B. No. 31 (1939); Princely Products Inc., 15 N. L. R. B. No. 44 (1939); Buckley Hemlock Mills, 15 N. L. R. B. No. 54 (1939); Gross Galesburg Co., 15 N. L. R. B. No. 74 (1939); Peoples Gas Light & Coke Co., 15 N. L. R. B. No. 113 (1939).

<sup>107</sup> Compare Eagle Manufacturing Co., 6 N. L. R. B. 492 (1938), where the employer was simply ordered to desist from "giving effect to its contract with the Eagle Employee's Alliance" (a "company" union), with Cowell Portland Cement Co., 8 N. L. R. B. 1020 (1938), where a similar order was entered with respect to an A. F. L. employer aided union, but with the proviso that nothing contained therein "shall preclude the respondents Union of Contra Costa County, No. 21074 . . . requiring . . . membership therein if such labor organization is the representative of the employees as provided in Section 9(a) of the Act." The Board has never ordered the "disestablishment" of an A. F. of L. or a C. I. O. union. See Senate Hearings, *op. cit.* at n. 6, pp. 108, 780; House Hearings, *op. cit.* at n. 11, p. 1033.

<sup>108</sup> N. L. R. B. v. Consolidated Edison Co., 305 U. S. 197 (1938).

Similar draconian treatment has been meted out to preferential-shop and exclusive-bargaining contracts which contravened the mandates of the Act. These have been held to constitute "a refusal to bargain with the duly designated representative of . . . employees in an appropriate unit, and . . . an unfair labor practice within the meaning of the Act."<sup>109</sup>

The invalidation of contracts covering members only was predicated upon more debatable grounds. In *Consolidated Edison Co.*,<sup>110</sup> the International Brotherhood of Electrical Workers (A. F. of L.) signed an agreement of this type after allegedly having received aid from the employer. Upon the charge of the rival United Electrical & Radio Workers of America (C. I. O.), the Company was ordered to cease giving effect to the contract because of its alleged employment as an instrument for the perpetuation of illegal favoritism and in order "to establish conditions for the exercise of an unfettered choice of representatives by the respondent's employees."<sup>111</sup> The Supreme Court refused to enforce this order.<sup>112</sup>

The Board has held that the right to choose representatives "involves the liberty to change representatives."<sup>113</sup> The expiration of the contractual relationship has been regarded as the logical occasion for the exercise of this right.<sup>114</sup> In cases involving the secession of local organizations from their parents during the life of a contract, however, the existence of the contractual relationship may be called

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<sup>109</sup> *National Motor Bearing Co.*, 5 N. L. R. B. 409 (1938). See the cases cited *supra*, n. 106.

<sup>110</sup> 4 N. L. R. B. 71 (1937).

<sup>111</sup> *Idem.*

<sup>112</sup> *N. L. R. B. v. Consolidated Edison Co.*, 305 U. S. 197 (1938).

<sup>113</sup> *Jefferson Electric Co.*, 8 N. L. R. B. 284 (1938). See also *Walla Walla Meat and Cold Storage Co.*, 9 N. L. R. B. 1183 (1938) and the dissenting opinions of Mr. Smith in *National Sugar Refining Co.*, 10 N. L. R. B. 1410 (1939) and *American Hair and Felt Co.*, 15 N. L. R. B. No. 61 (1939).

<sup>114</sup> E. g., *Utica Knitting Co.*, 8 N. L. R. B. 783 (1938); *Gowanus Towing Co.*, 8 N. L. R. B. 820 (1938); *California Woodturning Co.*, 8 N. L. R. B. 1057 (1938); *H. Margolin & Co.*, 9 N. L. R. B. 852 (1938). Although it has never decided the question, the Board appears unwilling to permit a change of representative during the life of a contract, in accord with its rejection of the substitutionary doctrine of contract. Mr. Fahy, in his testimony before the House Committee, *op. cit.* at n. 11, p. 1046 stated: "If there is a contract, we will not go in and hold another election—if it is a year contract—until the expiration of the contract or just preceding the expiration of the contract . . . ."

into question. Where a closed-shop contracting local accomplished its withdrawal by constitutional means,<sup>115</sup> it has been the Board's contention, in proceedings under Section 10, that the employer may not discharge the dissident employees upon the theory (a) that the agreement remained unaffected, and (b) that the agreement ran directly between him and the parent union,<sup>116</sup> and might therefore be conferred by the latter upon a "loyal" group which immediately attained the full privileges of its predecessor.<sup>117</sup> For, the Board's argument ran, either the contract had expired or the rebellious local retained full rights in it.

In representation cases, however, determination of the direction of contractual privileges has been made in a more cautious fashion. The withdrawal of two locals from an international union which had negotiated agreements in their behalf was held merely to raise a question of representation.<sup>118</sup> A seceded local acting as *de facto* representative of the employees in the administration of old and the negotiation of new agreements was accorded what was tantamount

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<sup>115</sup> *i.e.*, under the constitution of the labor federation with which it is affiliated. The weight accorded this factor seems to indicate a shift from the views expressed in *Frederick R. Barrett*, 3 N. L. R. B. 513 (1937), where it was held that there would be no determination as to whether legal revocation of a local's charter had been accomplished because "the Board will not interfere with the internal affairs of labor organizations." However, it may be only that in the latter case, involving an alleged unfair labor practice, the question was irrelevant to the main issue.

<sup>116</sup> Whether the local or the international union is the actual signatory can only be determined by actual reference to the contract. It is the author's impression, from personal inquiry, that actual practice in this respect is subject to a great deal of variation.

<sup>117</sup> *M & M Woodworking Co.*, 6 N. L. R. B. 372 (1938); *Smith Wood Products, Inc.*, 7 N. L. R. B. 950 (1938).

In *Bauman Bros. Furniture Mfg. Co.*, 18 N. L. R. B. No. 91 (1939), where a majority of employees of the plant switched from an A. F. of L. closed-shop local to a C. I. O. rival, discharge of the secessionists was held not to constitute an unfair labor practice. The Board based its decision, however, upon the finding that although the C. I. O. had secured a majority of the plant as a whole, it did not have a majority in the separate unit to which the discharged men had been attached, and that therefore the contract remained in effect.

<sup>118</sup> *Sound Timber Co.*, 8 N. L. R. B. 844 (1938). A complicating factor here, however, was the fact that following the defection of the two locals the international had become inactive and failed to assert its rights in the contract.

to *de jure* recognition by the failure of the Board to find the existence of a representation question.<sup>119</sup>

A good many points in connection with the status of secessionists still want clarification. For instance, there has been no Board determination of the "status of a valid contract where the officers and virtually the entire membership of the local union with which the contract was made vote to withdraw affiliation from the parent body, though such withdrawal is not effected strictly in accordance with the constitution of the parent body or the charter of the local union," nor of "the status of a valid contract where the union with which the contract was made continues in existence under the same name and affiliation but a majority of the employees in the bargaining unit have shifted their allegiance to another union."<sup>120</sup> These, and other similar questions, may have to be faced in the near future.

#### E. RIGHTS OF THE MINORITY

Section 9(a) of the National Labor Relations Act reserves to employees the right to present grievances to their employer. Beyond this simple declaration, however, lies a largely uncharted range of activities that minorities and minority unions might conceivably embrace in their endeavors to attain improved standing.

Perhaps the least complicated situation would be that in which the majority organization had been certified as the exclusive bargaining agency by the Board. The employer here would seem to be precluded from bargaining with a minority on matters concerning terms or conditions of employment.<sup>121</sup> Whether the minority could

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<sup>119</sup> *Pacific Steamship Co.*, 2 N. L. R. B. 214 (1936). It was provided, however, that should the parent or the employees take any action that would raise the question, the case would be reopened. Mr. Edwin S. Smith, doubting, felt that the bargaining agent should be given a more precise status by formal certification.

In a similar case, *Shipowners Association of the Pacific Coast*, 7 N. L. R. B. 1002 (1938), a question of representation was found and the *de facto* organization certified upon proof of a majority. There, however, the proximate termination of the contract rendered any interpretation of it unnecessary.

<sup>120</sup> *M & M Woodworking Co.*, 6 N. L. R. B. 372 (1938).

<sup>121</sup> While concurring in this general conclusion, Mr. Lennart Larson, in "The Labor Relations Acts," 36 *Michigan Law Review* 1237 (1938), thinks it possible "that a minority group would be permitted to bargain collectively with respect to a subject not embraced in the majority union's contract or with respect to special circumstances or conditions in which the

resort to economic coercion is a question for the courts; the statute, as the Board pointed out,<sup>122</sup> clearly negates a negative conclusion. Practically, however, formal certification of the majority would tend to reduce rival minorities to impotence by depriving them of the function of protecting the immediate economic interests of their members.<sup>123</sup>

Similar conclusions might be valid where there is an organized majority which has not received the sanction of the Board. The employer is none the less under the legal obligation to bargain exclusively with this group upon receipt of adequate proof of status.<sup>124</sup> But there may be more scope for minority activity under these circumstances, inasmuch as the employer may refuse to deal exclusively with the alleged majority union because of genuine doubt concerning the accuracy of its claims.<sup>125</sup>

It is difficult to determine the bounds of legitimate activity where no labor organization lays claim to majority status. The employer is not obliged to engage in collective bargaining with a minority,<sup>126</sup> but he may so elect of his own volition. It has not been directly decided whether, in the absence of conflicting claims, the minority may aspire to negotiate on behalf of all employees.<sup>127</sup> But there

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minority works." The authority for this assertion, however, is not clear. The entire theory of majority rule would seem to militate against its acceptability. Furthermore, such special circumstances are presumably provided for by the Board's power to determine the appropriate unit.

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<sup>122</sup> Charles Cushman Shoe Co., 2 N. L. R. B. 1015 (1937).

<sup>123</sup> There may be other factors, however, to mitigate the force of this deprivation. A corrupt majority union might engender revolt and invest a minority organization with the function of furthering the ultimate interests of the employees by supplanting the incumbent. An ideological opposition might have a similar reason for existence.

<sup>124</sup> The adequacy of the proof is a question of fact. See National Labor Relations Board, Third Annual Report (1938) p. 105.

<sup>125</sup> See Benedict Wolf, "The Duty to Bargain Collectively," 5 *Law and Contemporary Problems* 2 (1938).

<sup>126</sup> E. g., Segall-Maigen Co., 1 N. L. R. B. 749 (1936); Mooresville Cotton Mills, 2 N. L. R. B. 952 (1937); Wallace Manufacturing Co., 2 N. L. R. B. 1081 (1937); Todd Shipyards Corp., 5 N. L. R. B. 20 (1938); Titan Metal Manufacturing, 5 N. L. R. B. 577 (1938); Semet-Solvay Co., 7 N. L. R. B. 511 (1938).

<sup>127</sup> Chairman Madden has indicated his belief that the grant of exclusive bargaining privileges to a minority union would constitute discriminatory preference: House Hearings, *op cit.* at n. 11, p. 488. American Federation

would seem to be little doubt that any contract which the minority secures must accord equal treatment to all employees and that it must not contain a closed-shop provision.<sup>128</sup>

### F. THE EMPLOYER

The Wagner Act envisions the employer as a stranger to the organizational activities of his employees. N. L. R. B. rulings have fortified the intent of the law and indicated that in rival union disputes the employer is best protected by an attitude of benevolent neutrality. Deviation from this course of conduct has resulted in the successful prosecution of employers as violators of the interdictions contained in the Act. Discriminatory assistance to one of competing unions, whether by means of the grant of contracts conceding exclusive bargaining rights<sup>129</sup> or the closed shop<sup>130</sup> to unqualified organizations, discharge of the adherents of one of the competitors,<sup>131</sup> electioneering by supervisory employees,<sup>132</sup> denial of equal access to employees or discriminatory grant of plant facilities,<sup>133</sup> or threats of shut-down in the event of the disfavored

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of Labor spokesmen seem to feel, however, that even under the present Act a minority may bargain for all: Senate Hearings, *op. cit.* at n. 6, pp. 658, 799, 1169.

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<sup>128</sup> See the cases cited at n. 106, *supra*. The counsel to the A. F. L., Mr. Joseph Padway, indicated his disagreement with the Board. Citing a plant in which 300 of 1000 employees were organized, he maintained that a closed-shop contract with the organization "is absolutely permissible under the Wagner Act. The much vaunted 'majority rule' in the Wagner Act is, in many instances, mere fiction. I, for one, do not humbly prostrate myself before the majority rule." American Federation of Labor, *Proceedings*, 1937, p. 251.

<sup>129</sup> *E. g.*, Sands Manufacturing Co., 1 N. L. R. B. 546 (1936); Consolidated Edison Co., 4 N. L. R. B. 71 (1937).

<sup>130</sup> *E. g.*, National Electrical Products Corp., 3 N. L. R. B. 475 (1937); Lenox Shoe Co., 4 N. L. R. B. 372 (1937).

<sup>131</sup> *E. g.*, Sands Manufacturing Co., 1 N. L. R. B. 546 (1936).

<sup>132</sup> *E. g.*, National Electrical Products Corp., 3 N. L. R. B. 475 (1937); Consolidated Edison Co., 4 N. L. R. B. 71 (1937); National Motor Bearing Co., 5 N. L. R. B. 409 (1938); Zenite Metal Corp., 5 N. L. R. B. 509 (1938); Peninsular & Occidental Steamship Co., 5 N. L. R. B. 959 (1938); Carrollton Metal Products Co., 6 N. L. R. B. 569 (1938); Tennessee Copper Co., 8 N. L. R. B. 575 (1938) (in spite of the fact that the supervisory employees engaged in the discriminatory practices were members of one of the rival unions). See also cases cited in National Labor Relations Board, Third Annual Report (1938), p. 113, notes 35 and 37.

<sup>133</sup> American France Line, 3 N. L. R. B. 64 (1937) (employer ordered to grant equal number of ship passes to competing unions); Consolidated

union's victory in an election<sup>134</sup> have been castigated by the Board. Nor has the employer been permitted to encourage his employees to change unions, and thus evade his obligation to deal with the original representative, since that would be "to hold that the obligation of one subdivision of the Act may be evaded by the successful violation of another; that the freely expressed wishes of the majority of the employees may be destroyed if the employer brings to bear sufficient interference, restraint, and coercion to undermine the representatives' majority support."<sup>135</sup>

A ticklish problem arises in connection with alleged employer assistance to nationally affiliated unions.<sup>136</sup> How long the taint of company aid hovers over such organizations is a question of fact decided separately in each case. In *Pacific Greyhound Lines*,<sup>137</sup> the Amalgamated Association of Street and Electric Railway Employees (A. F. of L.), which had been found in an earlier proceeding<sup>138</sup> to have received help from the employer, secured a closed-shop contract four months after the cease and desist order resulting from the earlier case had issued. Upon the petition of the rival Brotherhood

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Edison Co., 4 N. L. R. B. 71 (1937); Waterman Steamship Co., 7 N. L. R. B. 237 (1938) (similar to American France Line); Jefferson Electric Co., 8 N. L. R. B. 284 (1938); South Atlantic Steamship Co., 12 N. L. R. B. 1367 (1939) (similar to American France Line); Pilot Radio Corp., 14 N. L. R. B. No. 83 (1939).

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<sup>134</sup> Carrollton Metal Products Corp., 6 N. L. R. B. 569 (1938).

<sup>135</sup> Bradford Dyeing Association, 4 N. L. R. B. 604 (1937). Missouri, Kansas & Oklahoma Coach Lines, 9 N. L. R. B. 597 (1938); Lady Ester Lingerie Corp., 10 N. L. R. B. 518 (1938); Gates Rubber Co., 13 N. L. R. B. No. 21 (1939). See also cases cited in National Labor Relations Board, Third Annual Report (1938), p. 96, notes 53, 54.

It should be noted, however, that statutory closed or preferential shop agreements constitute adequate defenses to charges of discriminatory discharge. See United Fruit Co., 12 N. L. R. B. 404 (1939); M & J Tracy Inc., 12 N. L. R. B. 936 (1939); Smith Wood Products Inc., 16 N. L. R. B. No. 65 (1939).

<sup>136</sup> While the A. F. of L. has freely admitted that employers are prone to accord it preference over the C. I. O. (see Senate Committee Hearings, *op cit.* at n. 6, pp. 644, 1039, 1168, 1370; House Committee Hearings, *op cit.* at n. 11, pp. 636, 637, 846, 847, testimony of Messrs. Green, Fries, Gooze and Padway), it has indignantly denied that an A. F. of L. union can be employer dominated. See, however, the testimony of George Kidwell, Senate Hearings, *idem*, pp. 879, 885; testimony of J. Vernon Burke, *idem*, pp. 3367, 3369, 3370.

<sup>137</sup> 9 N. L. R. B. 557 (1939).

<sup>138</sup> 4 N. L. R. B. 520 (1938).

of Railway Trainmen, the Board found that "there is no showing that . . . the effects of this assistance were removed or dissipated . . . the relations between the Company and the Amalgamated continued as theretofore . . . . The mere lapse of time between December 16, when the findings of assistance issued, and April 15 cannot itself be considered as proof of the dissipation of such effects."<sup>139</sup> In another case,<sup>140</sup> however, a C. I. O. charge that the respondent had encouraged membership in an A. F. of L. union was settled by a stipulation whereby the employer was required to cease from giving effect to any closed or preferential shop agreement for a period of four months from the date of the order, this lapse of time apparently being regarded as sufficient to dissipate the effects of any favoritism.

When an organization obtains the adherence of a majority of employees in an appropriate unit, the employer's duty is to grant it recognition to the exclusion of all competitors. ". . . the employer cannot fulfill its obligation to a labor organization which is the exclusive representative of the employees in an appropriate unit by offering to bargain with that labor organization for its members only."<sup>141</sup> The majority status in the absence of certification, it has been pointed out, is a question of fact, but the employer "is under the . . . obligation of cooperating with the union to a reasonable extent when the latter is attempting to prove its majority."<sup>142</sup> The duty to bargain "encompasses an obligation to enter into discussion and negotiation with an open and fair mind and with a sincere purpose to find a basis of agreement concerning the issues presented, to make contractually binding the understanding upon terms that are reached, and, under ordinary circumstances, to reduce that obligation to the form of a signed written agreement if requested to do so by the employees' representatives."<sup>143</sup> Employers have never been

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<sup>139</sup> 9 N. L. R. B. 557 (1939).

<sup>140</sup> National Tea Company, 9 N. L. R. B. 161 (1938).

<sup>141</sup> National Labor Relations Board, Third Annual Report (1938), p. 100.

<sup>142</sup> *Ibid.*, p. 106. "In considering whether an employer has fulfilled its obligation of reasonably cooperating with a union which is attempting to prove its majority, the Board has looked to the treatment accorded a competing union." See Stehli & Co. Inc., 11 N. L. R. B. 1397 (1939).

<sup>143</sup> Highland Park Manufacturing Co., 12 N. L. R. B. 1238 (1939). See, however, Inland Steel Co. v. N. L. R. B., 5 Labor Relations Reporter 560 (U. S. C. C. A. 1939).

penalized, however, for refusing to bargain with organizations which have gained majority status subsequent to the certification of a rival but before a year has elapsed.<sup>144</sup>

An employer was held justified in recognizing one of two contestants "without an inquiry into the numerical strength of the [other], at a time when it knew that the [other] was also organizing at the plant,"<sup>145</sup> upon the basis of signed membership cards totaling a clear majority. However, the safer practice would seem to be to refuse to recognize either union exclusively prior to certification.<sup>146</sup> Careful legal analysis has yielded the conclusion that "Dual contracts with each union for its members only, and exclusively with the one who proves the victor, with a proviso that the union victorious in a Board election shall be the exclusive bargaining agent, and including a clause whereby each agrees that if it loses it will not picket or boycott for a specified time, would seem to be the best solution for the employer."<sup>147</sup>

Coercion of the employer by one of rival unions, whether through threats of strike<sup>148</sup> and boycott<sup>149</sup> or actual strike and picketing<sup>150</sup> was held an inadequate defense to his failure or reluctance to perform his legal obligations. The Board expressed its sympathy for the "unenviable position" of the employer in such cases, but was forced to rule that when he fails to bargain "the violation of the Act is unmistakable."<sup>151</sup> Nor is the employer relieved of his obligation to bargain because the local union representing his employees

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<sup>144</sup> Rice, *op. cit.* at n. 80, p. 711.

<sup>145</sup> Aeolian-American Corp., 8 N. L. R. B. 1043 (1938).

<sup>146</sup> See 38 *Columbia Law Review* 1243, 1262 (1938). Also, 36 *Michigan Law Review* 1237 (1938): "if complaint issued on the ground of section 8(5) where the employer doubted reasonably the union's representative status and no other unfair labor practice and no strike were involved, he would be subject only to an order to bargain collectively if he were wrong."

<sup>147</sup> 38 *Columbia Law Review* 1243, 1263 (1938).

<sup>148</sup> Star Publishing Co., 4 N. L. R. B. 498 (1937); Peninsular & Occidental Steamship Co., 5 N. L. R. B. 959 (1938); Ward Baking Co., 8 N. L. R. B. 558 (1938).

<sup>149</sup> Pittsburgh Plate Glass Co., 4 N. L. R. B. 193 (1937); Simmons Co., 6 N. L. R. B. 208 (1938); Cowell Portland Cement Co., 8 N. L. R. B. 1020 (1938).

<sup>150</sup> Zellerbach Paper Co., 4 N. L. R. B. 348 (1937).

<sup>151</sup> Star Publishing Co., 4 N. L. R. B. 498 (1937); Federated Fishing Boats of New England, 12 N. L. R. B. 415 (1939).

changes its national affiliation,<sup>152</sup> though the change may have been of doubtful constitutionality.<sup>153</sup>

The Board's attempt to achieve strict employer neutrality met with a great deal of adverse criticism.<sup>154</sup> The American Federation of Labor, through Mr. Padway, interpreted the Act as leaving the "employer free to favor one of two competing national labor organizations as long as the acts of favoritism involved do not amount to coercion such as would overcome the will of the individual employee."<sup>155</sup> Employers have complained that the Board was abridging the constitutional guarantees of freedom of speech and of the press.<sup>156</sup> Mr. Madden countered with the assertion that "no board which can read English and can understand the purpose of this law can ever hold, under the present law, that the employer may choose the union for his employees," and warned that the adoption of a contrary policy would make the United States "the happy hunting ground for the company union."<sup>157</sup>

#### G. INTERVENTION BY RIVAL UNIONS

The complaint has been made that labor unions with vital interests in Board actions have been denied the privilege of participating in hearings.<sup>158</sup> The revised Regulations of the Board provide: "Whenever the complaint contains allegations under Section 8(2) of the Act, any labor organization referred to in such allegation shall be duly served with a copy of the complaint and notice of hearing. Whenever any labor organization, not the subject of any 8(2) allega-

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<sup>152</sup> American-Hawaiian Steamship Co., 10 N. L. R. B. 1355 (1939) ("It is plain that nothing more than a change in name and affiliation took place, and we find that the labor organization certified by us did not cease to exist because of its transfer of affiliation . . . . What we certified in the representation cases was not a name, but a union."); American Range Lines Inc., 13 N. L. R. B. No. 20 (1939).

<sup>153</sup> Newark Rivet Works, 9 N. L. R. B. 498 (1938); Consumers Power Co., 9 N. L. R. B. 701 (1938).

<sup>154</sup> See, "The G - D - Labor Board," 18 *Fortune* No. 4, October, 1938.

<sup>155</sup> Brief in Jefferson Electric Co. v. N. L. R. B., 102 Fed. (2d) 949 (1938); quoted in 3 *Labor Relations Reporter* No. 13, p. 3 (1938).

<sup>156</sup> For a full discussion of this issue, see "Recent Limitations on Free Speech and Free Press," 48 *Yale Law Journal* 54 (1938).

<sup>157</sup> American Federation of Labor, *Proceedings*, 1937, p. 236.

<sup>158</sup> See Senate Hearings, *op. cit.* at n. 6, pp. 1159, 1160. For a contrary assertion, see Gellhorn and Linfield, "Politics and Labor Relations," 39 *Columbia Law Review* 339 (1939).

tion in the complaint, is a party to any contract with the respondent the legality of which is put in issue by any allegation of the complaint, such labor organization shall be made a party to the proceeding."<sup>159</sup> The broad scope of this permission should allay all dissatisfaction with this aspect of N. L. R. B. procedure.

#### H. CONFLICT WITH THE COURTS

On several occasions, Board orders in rival union cases have come before the courts in suits by outside parties. Several of these, involving the power of the Board to invalidate collective agreements or exclusive bargaining relationships contrary to equitable decree, have been discussed above.<sup>160</sup> In another, the United States District Court for the District of Oregon differed with the Board on the effect of local union secession upon the allocation of contractual rights.<sup>161</sup> In these cases, the Board stoutly defended its right to exclusive jurisdiction and discounted the effect of the court decrees upon the ground that the "issues under the Act [were not] set up in the pleadings or considered or decided by the Court."<sup>162</sup>

There have been numerous statistical studies of the Board's activity, amply bearing out the importance of its work in relation to rival union competition. Since it would be impossible to reproduce this material here, the interested reader is referred to the references contained in the footnote hereto.<sup>163</sup>

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<sup>159</sup> Rules and Regulations of the National Labor Relations Board, Effective July 14, 1939, Article II, Section 5.

<sup>160</sup> *Supra*, p. 187.

<sup>161</sup> *M & M Woodworking Co.*, 6 N. L. R. B. 372 (1938); *M & M Woodworking Co. v. Plywood & Veneer Workers Union*, 23 Fed. Supp. 11 (1938).

<sup>162</sup> *National Electric Products Corp.*, 3 N. L. R. B. 475 (1937). See Note, 47 *Yale Law Journal* 799 (1938), where it is held that the "Board's action did not violate any canon of *res adjudicata*." Also, 5 *University of Chicago Law Review* 148 (1937).

<sup>163</sup> The best general presentation of Board statistics is contained in the Board's report to the Senate Committee on Education and Labor, *op. cit.* at n. 6, pp. 467-614. See also, Annual Reports of the National Labor Relations Board for the Years 1936, 1937, 1938 and 1939; "Employee Elections Conducted by the National Labor Relations Board," 47 *Monthly Labor Review* 1 (1938); Labor Relations Reporter, *passim*, for monthly and quarterly tabulations of election results; R. A. Nixon, "Appropriate Collective Bargaining Units," reprinted from the Spring, 1939 issue of the *Harvard Business Review* in Senate Hearings, *op. cit.* at n. 6, pp. 2964-2971; weekly mimeographed releases of the N. L. R. B., containing election results.

## STATE LABOR RELATIONS BOARDS

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Following the adoption of the National Labor Relations Act, five states passed similar legislation.<sup>1</sup> The labor boards created thereby promulgated, in pursuance of their quasi-judicial duties, a series of rulings tending to conform to the N. L. R. B. decisions discussed above. The exceptions and qualifications, however, have been frequent and important enough to warrant partial retracing of some steps already taken.<sup>2</sup>

All the boards have had occasion to consider labor disputes involving conflicts between the two federations of labor.<sup>3</sup> Jurisdictional disputes have been presented to the New York and Massachusetts boards. The power of the former to act, however, was limited by the statutory denial of jurisdiction over this species of controversy,<sup>4</sup> while the latter followed the lead of the N. L. R. B. in refusing to intervene, but stated that its election facilities were available

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<sup>1</sup> These were Massachusetts, New York, Pennsylvania, Wisconsin and Utah. Several of these statutes have since been repealed or amended. See *supra*, pp. 139-146. Discussions of the problems of conflicting state and federal jurisdiction are contained in 27 *California Law Review* 438 (1939) and 35 *Illinois Law Review* 558 (1939).

<sup>2</sup> The decisions of the Utah Labor Relations Board have not been made available to the author and for that reason cannot be included. The omission is not serious, however, since during the first year of its activity, July 1, 1937 to June 30, 1938, the Board entertained but 205 labor disputes, of which 97 per cent were adjusted without hearing. Only 3 elections were held during that period, and 4 certifications were issued. See Bulletin No. 5 of the Industrial Commission of Utah (1938).

<sup>3</sup> By Section 111.09 of the Wisconsin Labor Relations Act (which has been superseded by the Wisconsin Employment Peace Act) the Wisconsin Labor Relations Board (to be distinguished from the present Wisconsin Employment Relations Board) might have escaped the necessity of assuming jurisdiction over this type of dispute. It did not avail itself of this privilege, however. See William Gorham Rice, "The Wisconsin Labor Relations Act," 1938 *Wisconsin Law Review* 229 (1938).

<sup>4</sup> *Supra*, p. 132. The New York Board refused, however, to renounce jurisdiction where the Executive Council of the American Federation of Labor had already determined jurisdictional lines. Hotel Alamac, N. Y. S. L. R. B., Dec. No. 103 (1938).

to such disputants if they could agree to thus resolve their difficulties.<sup>5</sup>

#### A. THE EXISTENCE OF A QUESTION CONCERNING REPRESENTATION

The state boards, in the presence of such factors as the existence of a satisfactory bargaining relationship between the petitioning union and the employer,<sup>6</sup> a valid collective agreement with an organization rival to that seeking certification,<sup>7</sup> or the adherence of but a small minority of the employees to the petitioner,<sup>8</sup> have denied petitions for investigation. However, "Conflicting claims by rival labor organizations will in almost every case require a finding that a question concerning representation has arisen. A finding to that effect will be made where the employer refuses to negotiate with either organization until one has been certified by the Board, or where the employer claims that it cannot ascertain which of the two organizations represents a majority of the employees."<sup>9</sup>

#### B. THE UNIT APPROPRIATE

On the whole, the state boards have maintained a solicitous attitude toward the separatist aspirations of minority crafts, although the craft-industrial cleavage has not proved a serious problem.<sup>10</sup> The provision of the New York law which accords autonomy

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<sup>5</sup> Hotel Statler Co. Inc., Mass. L. R. C. No. CR-197 (1939).

<sup>6</sup> Kanter Department Stores, Inc., N. Y. S. L. R. B., Dec. No. 90 (1938); Jamaica Wholesale Meat Co., N. Y. S. L. R. B., Dec. No. 165 (1938); Old Russian Bear Restaurant, N. Y. S. L. R. B., Dec. No. 297 (1938); Buffalo Baking Corporation, N. Y. S. L. R. B., Dec. No. 706 (1939); R. E. McNary Inc., Pa. L. R. B., No. R-3005 (1937) ("The company has long ago recognized the Association and has dealt with it as the representative of its employees. Our certificate can be of no avail to any of the parties involved.")

<sup>7</sup> Crystal Cab Corporation, N. Y. S. L. R. B., Dec. No. 51 (1938); New York Rapid Transit Co., N. Y. S. L. R. B., Dec. No. 52 (1937); Jamaica Wholesale Meat Co., N. Y. S. L. R. B., Dec. No. 165 (1938); Triboro Coach Corp., N. Y. S. L. R. B., Dec. No. 151c (1938); Avenue B & East Broadway Transit Co., Dec. No. 244 (1938). Cf., however, Kansas Packing Co., N. Y. S. L. R. B., Dec. No. 489 (1938).

<sup>8</sup> Lewandos French Dyeing and Cleaning Co., Mass. L. R. C., No. C R-104 (1938). Petitioner here could only claim 15 out of 271 employees.

<sup>9</sup> Annual Report of the Industrial Commissioner, New York State Department of Labor (1938), p. 119.

<sup>10</sup> See "State Labor Relations Boards," 7 *I. J. A. Bull.* No. 2 (1938). The paucity of controversy is ascribed to the fact that the state boards have not dealt in the mass production industries.

"where the majority of employees of a particular craft shall so decide"<sup>11</sup> has not resulted in any great divergence from the unit decisions of the national board.<sup>12</sup> Where there was a lack of employee unanimity in the designation of a unit, crafts were permitted to vote separately on the question of inclusion in the more comprehensive grouping, the majority in each prevailing.<sup>13</sup> However, artificial subdivisions bearing no relationship to genuine craft considerations were barred.<sup>14</sup>

The Massachusetts board accepted from the outset the principle of craft autonomy. In setting off a class of employees, it cited the fact that the numerical superiority of fellow employees of a different craft would render nugatory the desires of the former and deprive them of the "opportunity to select a representative 'of their own choosing'," expressed its fear that the undoubted jurisdiction of an as yet inactive union over the segregated craft might, if exercised, create a situation "which would not be conducive to the best interests of the employees," and stated its conviction that "there was no probative evidence presented at the hearing that the [crafts] would best be insured the full benefit of the purposes of the Act by their inclu-

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<sup>11</sup> New York State Labor Relations Act, Section 705(2).

<sup>12</sup> Obligatory craft independence where desired is to some extent offset by the necessity of defining the term "craft." For instance, in *Hearn Department Store*, N. Y. S. L. R. B., Dec. No. 128 (1938), it was necessary to determine whether warehouse employees were a craft apart from retail salespeople. The Board decided that "certain apparent differences in functions and lack of contact with the store employees raise a doubt as to whether the warehouse employees should be included with the other employees in a single unit." A contrary opinion would have precluded selection by the employees themselves.

The New York Board has held that where "all parties stipulate that a particular group of employees constitute a unit appropriate for the purpose of collective bargaining, it is not the policy of this Board, in making its own finding concerning the appropriate unit, to alter the unit agreed upon unless it is patently unreasonable . . . ." *Arnold Constable & Co.*, N. Y. S. L. R. B., Dec. No. 699-A (1939). See also *Nassau and Suffolk Lighting Co.*, N. Y. S. L. R. B., Dec. No. 88 (1939).

<sup>13</sup> *Consolidated Laundry Corp.*, N. Y. S. L. R. B., Dec. No. 4 (1937); *Sachs Quality Furniture Co.*, N. Y. S. L. R. B., Dec. No. 39 (1937); *Hearn Department Stores*, N. Y. S. L. R. B., Dec. No. 128 (1938); *Buffalo General Laundries*, N. Y. S. L. R. B., Dec. No. 377 (1939).

<sup>14</sup> *Metropolitan Life Insurance Co.*, N. Y. S. L. R. B., Dec. No. 129 (1938); *New York Trap Rock Corp.*, N. Y. S. L. R. B., Dec. No. 157 (1938); *Bloomington Bros.*, N. Y. S. L. R. B., Dec. No. 278 (1938) (office employees included in the same unit as retail employees despite the Board's express acknowledgement that the usual practice both of

sion in the same unit with the [majority] and similar employees."<sup>15</sup> However, in the absence of true craft divisions the prevailing factor has been the furtherance of collective bargaining for those employees signifying their intention of practicing it.<sup>16</sup>

The New York Board, in unit determination and other issues, has manifested a tendency to refrain from taking any action that might result in the impairment of existing bargaining relationships. When a defeated union sought to reopen the question of the appropriate unit, its plea was rejected in these terms:

Where . . . the unit selected has been agreed upon by all parties . . . , where there is no evidence of bad faith or collusion in the selection of the unit, where the unit is not, on its face, an unreasonable selection and no other unusual or extraordinary circumstances appear requiring an immediate determination of the appropriate unit by the Board, and when an inclusive agreement has consummated the selection of representatives on the basis of that unit, the considerations . . . compel the Board to refuse to re-examine the unit selected by the parties.<sup>17</sup>

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itself and the national board was contrary); *Endicott Circuit Inc.*, N. Y. S. L. R. B., Dec. No. 753 (1939).

The factors employed in unit determination have been classified by the New York Board as follows: ". . . the persuasive consideration in the measurement of unit should be, whenever possible and reasonable, the effectuation of the declared policy of the Act: the encouragement of the practices and procedure of collective bargaining. This does not mean that the Board will always accept whatever form self-organization may have taken, however amorphous or illogical, as the criterion for determining the appropriate bargaining unit. It means only that, if after careful evaluation of the nature of the employer's business and the work done by the employees involved, their training, their wages, the history of bargaining in the industry, the claims of the labor organizations in the field and other accepted criteria for determining the unit, it may be found that a definite group of employees is sufficiently homogeneous, they may properly be regarded as a unit appropriate for bargaining purposes, even though a larger and more effective unit might ultimately be established at a later date." *Saks & Co.*, N. Y. S. L. R. B., Dec. No. 641 (1939).

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<sup>15</sup> *Dorothy Muriel, Inc.*, Mass. L. R. C., No. CR-1 (1937). See also *Whalen Lunch*, Mass. L. R. C., No. CR-139 (1939); *Eden Sea Grill*, Mass. L. R. C., No. CR-140 (1939). Subsequent to these decisions, the Massachusetts Act was amended to provide craft autonomy. *Supra*, p. 131.

<sup>16</sup> *Metropolitan Life Insurance Co.*, Mass. L. R. C., No. CR-14-19 (1938); *John Hancock Mutual Life Insurance Co.*, Mass. L. R. C., No. CR-20-22 (1938); *M & P Theatres Corp.*, Mass. L. R. C., No. CR-117 (1938); *C. W. Whittier & Bros.*, Mass. L. R. C., No. UP-419 (1939); *Rhodes Bros. Co.*, Mass. L. R. C., No. CR-294 (1939).

<sup>17</sup> *Crystal Cab Corp.*, N. Y. S. L. R. B., Dec. No. 51 (1938).

## C. ELECTION AND CERTIFICATION

In ballot preparation, some variation from the practice of the N. L. R. B. is discernible. Unions were refused places because they had "failed to establish a sufficiently tangible or definite status."<sup>18</sup> Only one state board originally provided an "or neither" space in elections between two or more unions.<sup>19</sup> When the New York Board, under the stimulus of "special circumstances," first permitted the inclusion of this option, a difficult situation arose. In tabulating the results of balloting between certain C. I. O. and A. F. of L. locals, it was found that although a plurality of the employees had voted to be represented by neither organization, the combined vote of the two unions constituted a majority of the votes cast. The Board, upon the theory that "a majority of the employees participating in the said election have indicated their desire to be represented by either [of the unions],"<sup>20</sup> ordered a new election with only the names of the two unions on the ballot. Recently, the New York Board has adopted the practice of including a "neither" choice as a matter of course.<sup>21</sup> In tie votes, where the "neither" votes hold the balance of power, run-off elections are ordered which accord employees the privilege of voting only for one or the other of the contesting organizations.<sup>22</sup>

The New York Board also held that "designations of representatives by secret ballot may be determined on the basis of a majority

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<sup>18</sup> Consolidated Laundries Corp., N. Y. S. L. R. B., Dec. No. 4 (1937); Varrick Machine & Tool Works, N. Y. S. L. R. B., Dec. No. 227 (1938).

<sup>19</sup> Only the Massachusetts Board followed this practice. Letter to the author from Mr. Harold L. Burke, Executive Secretary of the Board, March 9, 1939. The Wisconsin Board did not commit itself "as to whether or not such choice would be given the voter in the event that a formal request was made for the choice of 'neither' during the course of a hearing conducted pursuant to a petition for investigation and certification of representatives." Letter to the author from J. K. Kyle, Executive Secretary, March 2, 1939. Cf. New York Trap Rock Corp., N. Y. S. L. R. B., Dec. No. 157 (1938); Aldar Realty Co., N. Y. S. L. R. B., Dec. No. 177 (1938); Building Service Management Corp., Pa. L. R. B., No. pgh. R-3001, 3004 (1937).

<sup>20</sup> Daniel Reeves, N. Y. S. L. R. B., Dec. No. 134-A, B (1938). See also John Morrell & Co., Dec. No. 291 (1938).

<sup>21</sup> Hotel St. George Corporation, N. Y. S. L. R. B., Dec. No. 655-B (1939); Arnold Constable & Co., N. Y. S. L. R. B., Dec. No. 699 (1939).

<sup>22</sup> Prompt Family Laundry Inc., N. Y. S. L. R. B., Dec. No. 771 (1939).

of all persons actually voting, even though the substantial number voting constituted less than an actual majority of eligible voters participating in the election."<sup>23</sup> The Massachusetts Commission, however, refused to certify where a majority of the eligible voters did not participate in the election.<sup>24</sup> Wisconsin required a "majority of the eligible votes cast, provided that a representative total vote is cast."<sup>25</sup>

Elections have been set aside where one of the participants proved upon subsequent inquiry to be a company union,<sup>26</sup> or where employer intimidation was established,<sup>27</sup> but one conducted by another official labor agency was honored.<sup>28</sup>

A definite term for certifications was adopted by the New York Board:

Where a representative has been certified by the Board as having been designated or selected, such certification shall remain in effect for a period of one (1) year from the date thereof, provided, however, that in any case where unusual or extraordinary circumstances require such action, or where such action may be necessary to prevent the occurrence or continuation of an unfair labor practice, the Board, in its discretion, may fix the life of such representative for a lesser period, or may, prior to the expiration of such year, and after investigation . . . certify the same or another person or organization as the representative designated or selected, or may extend the period of the original certification, or make other disposition of the matter.<sup>29</sup>

The New York Board has not determined whether this policy "is equally applicable to a prior designation in reliance on which no action has been taken by the employer [i. e., where no contract has been signed]; nor has the Board yet decided whether or not contracts

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<sup>23</sup> Crystal Cab Corp., N. Y. S. L. R. B., Dec. No. 51 (1938).

<sup>24</sup> Cemetery of Mt. Auburn, Mass. L. R. C. No. CR-209 (1939). More recently, however, in Independent Taxi Operators Assn., Mass. L. R. C. No. CR-141 (1939), a union receiving only 146 out of a total eligibility list of 670 votes was certified.

<sup>25</sup> Wisconsin Labor Relations Board, Report Covering the Period from April 28, 1937 to November 30, 1938, p. 19.

<sup>26</sup> United Cigar—Whelan Stores Corp., N. Y. S. L. R. B., Dec. No. 38 (1937).

<sup>27</sup> Spielman Motor Sales Co., N. Y. S. L. R. B., Dec. No. 32-A (1938); Connor Lumber and Land Co., Wis. L. R. B., No. R-65 (1937).

<sup>28</sup> Crystal Cab Corporation, N. Y. S. L. R. B., Dec. No. 51 (1938). The New York City Industrial Relations Board had conducted the election.

<sup>29</sup> New York State Labor Relations Board, Rules and Regulations, May 20, 1937, Article III, Section 11.

for a term of more than a year go beyond the 'reasonable period' during which new petitions will be dismissed."<sup>30</sup>

The policy of the Wisconsin Board was less explicit. Its regulations provided that a certification "shall be conclusive until revoked by the board either with the consent of the representatives or after a proceeding under this article."<sup>31</sup> Direct inquiry elicited the following response:

The general policy adopted by this Board with respect to certifications recognizes their validity for a period of one year, or until a further question of representation is raised. The Board has recognized one or two special circumstances under which a second election was held before the expiration of a year.<sup>32</sup>

The Massachusetts board has no fixed policy, "but it has been understood that in the absence of untoward circumstances, [certification] would run for at least a year."<sup>33</sup>

#### D. COLLECTIVE AGREEMENTS

It has already been remarked that the New York Board has been especially concerned lest any of its acts tend to disrupt existing bargaining relationships. Nowhere is this more clearly manifested than in its attitude toward collective agreements. Although continuing contracts have been disregarded in representation proceedings or set aside in unfair labor cases under such special circumstances as lack of proof that they were authorized by the proper representatives of the employees,<sup>34</sup> the fact that they were negotiated

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<sup>30</sup> Report of the Industrial Commissioner, *op cit.* at n. 9, p. 123.

<sup>31</sup> Wisconsin Labor Relations Board, Rules and Regulations, Section 6.

<sup>32</sup> Letter to the author from J. K. Kyle, Executive Director of the Board, March 2, 1939. For a case involving the special circumstances mentioned in Mr. Kyle's letter, see Creamery Package Manufacturing Co., Wis. L. R. B., No. R-67 (1937).

<sup>33</sup> Letter to the author from Harold L. Burke, Executive Secretary of the Massachusetts Labor Relations Commission, March 9, 1939.

<sup>34</sup> Grant W. Anson, N. Y. S. L. R. B., Dec. No. 23 (1937); United Long Island Theatre Corp., N. Y. S. L. R. B., Dec. No. 132 (1938); Fred Picarillo, N. Y. S. L. R. B., Dec. No. 142 (1938); Hilary Theatre Corp., N. Y. S. L. R. B., Dec. No. 205 (1938); Economy Clean Towel Supply Co., N. Y. S. L. R. B., Dec. No. 198 (1938); Kansas Packing Co., N. Y. S. L. R. B., Dec. No. 277 (1938); H. J. B. Theatre Corp., N. Y. S. L. R. B., Dec. No. 236 (1938).

with company-dominated unions,<sup>35</sup> that they covered only the members of the contracting union,<sup>36</sup> or were merely tentative in character and negotiated during the pendency of proceedings in the face of the sharply conflicting demands of a rival organization,<sup>37</sup> or were shortly to expire,<sup>38</sup> or when a shift in representation was brought to the attention of the employer prior to the contractual automatic renewal date,<sup>39</sup> the Board has resolutely affirmed the inviolability of valid agreements. The reasons advanced were stated clearly in the *Crystal Cab* case:

By guaranteeing employees the right to bargain collectively through representatives of their own choosing, the Act clearly contemplates that the exercise of such right will result in the creation of harmonious industrial relations and industrial peace, through the medium of collective agreements. Once such a relationship has been established and such an agreement made, consistently with the Act, the very purpose of the Act might be defeated if they were not given a reasonable measure of continuity and protection. Where a contract has been entered into by a representative, freely selected by a majority of the employees, the machinery of this Board must not be used to upset the stable relationship thus created.<sup>40</sup>

This policy has been reiterated time and again.<sup>41</sup> One case in particular merits detailed exposition as illustrative of some difficulties that may be encountered in the strict application of this theory. The City of New York, as a condition precedent to the grant of a franchise, required the Triboro Coach Co. to enter into a collective agreement with a bona fide labor union. At the time, the

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<sup>35</sup> International Railway Co., N. Y. S. L. R. B., Dec. No. 251 (1938). In Kansas Packing Co., N. Y. S. L. R. B., Dec. No. 489 (1938), a contract with an A. F. of L. union was held not to bar an election, because of company assistance. Similarly, Savemore Markets Inc., N. Y. S. L. R. B., Dec. No. 614 (1939).

<sup>36</sup> Gresham Realty Co., N. Y. S. L. R. B., Dec. No. 226 (1938).

<sup>37</sup> General Baking Co., N. Y. S. L. R. B., Dec. No. 160 (1938); Ace Shirt Laundry, Inc., N. Y. S. L. R. B., Dec. No. 770 (1939).

<sup>38</sup> Crawford Clothes, N. Y. S. L. R. B., Dec. No. 2 (1937).

<sup>39</sup> Enterprise Garnetting Co., N. Y. S. L. R. B., Dec. No. 271 (1939); Premier Linen Supply and Laundry Co., N. Y. S. L. R. B., N. Y. Times, Nov. 26, 1939.

<sup>40</sup> Crystal Cab Corporation, N. Y. S. L. R. B., Dec. No. 51 (1938).

<sup>41</sup> Kanter's Department Stores, Inc., N. Y. S. L. R. B., Dec. No. 90 (1938); New York Rapid Transit Co., N. Y. S. L. R. B., Dec. No. 52 (1938); Avenue B & East Broadway Transit Co., N. Y. S. L. R. B., Dec. No. 244 (1938); Walter F. Keller, N. Y. S. L. R. B., Dec. No. 703 (1939); Blue Ridge Coal Corp., N. Y. S. L. R. B., Dec. No. 746 (1939). Cf. General Baking Co., N. Y. S. L. R. B., Dec. No. 151 (1938); Riverside Properties Inc., N. Y. S. L. R. B., Dec. No. 409 (1939).

Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America (A. F. of L.) was the only such union in existence, and therefore Triboro signed a three-year closed-shop contract with it. Subsequently, a new rival, the Transport Workers Union (C. I. O.) organized what it claimed to be a majority of the employees and petitioned the Board for certification. At first, the Board pointed out that since the employees had never designated representatives, they would be deprived of statutory rights unless accorded the privilege of doing so. An election was ordered, but it was stated that this did not decide "the validity of the contract or . . . the question of the effect an election might ultimately have upon the contractual obligations of the parties."<sup>42</sup>

Upon reargument, however, the Board reversed itself. Stressing the fact that when the contract was executed there were no employees; that the agreement was consummated prior to the adoption of the Labor Relations Act, at which time it was clearly valid; and that certification of the T. W. U. might well cause Amalgamated to seek legal redress, it concluded:

We are not here called upon to resolve the legal problems which would thus be created. We believe, however, that we should not contribute to their creation, and thus disturb a valid contractual relationship established long before the Act became effective. It is our judgment that under all the circumstances of this particular case the holding of an election now could lead only to confusion and ultimately create, rather than prevent, uncertainty and industrial strife . . . . We find, therefore, that the continued existence of the contract . . . forecloses all questions of representation during the life of that contract, and that it would be contrary to the policy of the Act were we to conduct an investigation or issue a certification in this particular matter.<sup>43</sup>

The position of the Wisconsin Labor Board was in general similar to that of the New York Board:

The Wisconsin Board has felt that as a general proposition when a trade agreement is made under normal conditions with a genuine union chosen by a majority of the employees, no elections should be held during the life of the agreement, except to determine what union may bargain for terms and conditions to apply after the expiration of the existing agreement, unless the existing agreement is for such an unreasonably long time as in effect to deny to employees their fundamental right of self organization.<sup>44</sup>

<sup>42</sup> Triboro Coach Co., N. Y. S. L. R. B., Dec. No. 151 (1938).

<sup>43</sup> Triboro Coach Co., N. Y. S. L. R. B., Dec. No. 151c (1938). An election was finally held in 1939, at the expiration of the contract. See *N. Y. Times*, Dec. 6, 1939.

<sup>44</sup> Wisconsin Labor Relations Board, Report, *op cit.* at n. 25, p. 20

The Board would not hesitate . . . to issue an order giving redress where a collective bargaining agreement for a period of longer than one year was signed by the employer and one union with the effect of eliminating a second union which had substantial claims to majority membership.<sup>45</sup>

The Massachusetts Commission apparently gives less weight to collective agreements. A closed-shop contract executed as a result of a strike threat over the protests of a rival union was held to be inconclusive.<sup>46</sup> In another case, because of the fact that some members of the petitioning union were also members of the contracting employer organization, a six-months old agreement was disregarded in representation proceedings.<sup>47</sup>

The logical consequences of the New York Board's insistence upon the sanctity of agreements were the rejection of a substitutionary doctrine of contract and the stipulation of an optimum contract term. In regard to the former, the Board has found it "inconceivable that the legislature intended to permit employees who have entered into . . . a valid contract with their employer to substitute one bargaining agency for another whenever the spirit moves them."<sup>48</sup> It may be noted here that the Pennsylvania Board in effect adopted a contrary policy.<sup>49</sup> A contract term of one year received express sanction in New York,<sup>50</sup> but under "unusual" circumstances representation proceedings have been held foreclosed for a longer period.<sup>51</sup>

#### E. THE CLOSED SHOP

Only in Wisconsin did the closed-shop issue present any novel questions. There, the State Labor Relations Act permitted the conclusion of an agreement embodying a closed-shop clause with a

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<sup>45</sup> Letter to the author from J. K. Kyle, Executive Secretary of the Wisconsin Board, March 2, 1939.

<sup>46</sup> Central Cab Company, Inc., Mass. L. R. C. No. CR-146 (1939).

<sup>47</sup> Independent Taxi Operators Assn., Mass. L. R. C. No. CR-141 (1939).

<sup>48</sup> Crystal Cab Corporation, N. Y. S. L. R. B., Dec. No. 51 (1937). See also Triboro Coach Co., N. Y. S. L. R. B., Dec. No. 151c (1938); Jamaica Wholesale Meat Co., N. Y. S. L. R. B., Dec. No. 165 (1938).

<sup>49</sup> Red Star Shoe Repairing Co., Pa. L. R. B., No. C1-3 (1937). The Pennsylvania courts, however, refused to accept this view. See *Pennsylvania L. R. B. v. Red Star Shoe Repairing Co.*, C. C. H. par. 18,066 (1937).

<sup>50</sup> New York Rapid Transit Co., N. Y. S. L. R. B., Dec. No. 52 (1938).

<sup>51</sup> Triboro Coach Corp., N. Y. S. L. R. B., Dec. No. 151c (1938). See *supra*, p. 282.

labor organization other than that designated by the majority of the employees. Professor Rice was of the opinion that an employer might not contract for the closed shop with a union when either a rival union had been certified by the Board as bargaining agent or there was no substantial doubt that the rival was preferred by the employees.<sup>52</sup> These points, however, were never resolved by the Wisconsin Board itself.<sup>53</sup>

### F. MINORITY RIGHTS

The Pennsylvania Board expressly affirmed the right of a minority of employees to strike, and pointed out that a petition for investigation was "not the proper procedure to be followed in an arbitration of . . . differences with [minority] employees or the Company."<sup>54</sup> Minority organizations have, of course, been denied certification by the state boards.<sup>55</sup>

### G. THE EMPLOYER UNDER THE STATE ACTS

The New York Board permits an employer to file a petition for investigation,<sup>56</sup> with the proviso that no election may be directed solely at his behest.<sup>57</sup> However, this privilege has proved of little importance in practice.<sup>58</sup>

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<sup>52</sup> Rice, *op. cit.* at n. 3.

<sup>53</sup> The Board did have occasion to consider a closed-shop agreement in Freeman Shoe Corporation, Wis. L. R. B., Nos. C-5, R-19 (1937) and in Creamery Package Co., Wis. L. R. B., Nos. C-R1, R-67 (1938). In the former, however, the contracting union was definitely possessed of a majority, while in the latter an agreement between the parties disposed of the issues. See Wisconsin Labor Relations Board, Report, *op. cit.* at n. 25, p. 4.

<sup>54</sup> E. S. McNary Inc., Pa. L. R. B., No. R-3005 (1937).

<sup>55</sup> E. g., Horn & Hardart Co., N. Y. S. L. R. B., Dec. No. 3 (1937); Laurel Club Beverage Co., Mass. L. R. C., No. CR-69 (1938).

<sup>56</sup> New York State Labor Relations Board, Rules and Regulations, *op. cit.* at n. 29, Article III, Section 1.

<sup>57</sup> See the New York State Labor Relations Act, Section 705 (4). The Board has ruled that "where an employer files a petition for investigation and certification of representatives and neither the employees concerned nor any interested labor organization has consented to the holding of an election, the Board can not direct an election or take any other steps leading to the certification of the representatives." First Annual Report, for the Year Ended December 31, 1937, p. 13.

<sup>58</sup> From July 1, 1937 to June 30, 1939, only 85 such petitions were filed by New York employers. 52 were situations in which two or more labor organizations were competing. 35 were controversies between A. F. of L. and C. I. O. unions, while in 16 others an A. F. of L. or a C. I. O.

Section 3 of the old Wisconsin Act, "though it does not expressly authorize such action, creates by its mode of statement a potent implication that it is not an unfair labor practice to discriminate in favor of a union that is listed."<sup>59</sup> The Wisconsin Board held that an all-union agreement with a union which had secured a majority through unlawful employer *encouragement* was valid, but it coupled the warning that nothing "permits an employer to discourage membership in a genuine union by such conduct as that attributable to respondent."<sup>60</sup> In rival union situations, of course, aid to one organization necessarily involves discrimination against another.

The state boards have regarded rival union cases as unwelcome additions to already difficult tasks. Pennsylvania's Board remarked that it was "confronted at times with trying situations occasioned by the differences prevailing between the two big forces of organized labor."<sup>61</sup> The old Wisconsin Board found that its problems "were enormously increased by the unfortunate split in the American labor movement . . . . This split developed many situations which were extremely exasperating both to employers and the general public, and which did the cause of organized labor an incalculable amount of harm."<sup>62</sup>

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union faced an unaffiliated union. 65 of the total number of petitions filed were settled informally, 12 were acted upon by the Board, the rest were pending on June 30, 1939. Of the 12 acted upon, 6 involved C. I. O.-A. F. of L. disputes, 3 involved either A. F. of L. or C. I. O. unions and non-affiliated unions, 1 involved all three of these groups, while in 2 cases only one organization was involved. See Louis Goldberg, *Elections and Certifications of Labor Organizations Conducted by the New York State Labor Relations Board* (1939), contained in Senate Hearings, *op. cit.* at chap. xi, n. 6, pp. 2683 ff.

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<sup>59</sup> Rice, *op. cit.*, at n. 3.

<sup>60</sup> Freeman Shoe Corp., Wis. L. R. B., Nos. C-5, R-19 (1937).

<sup>61</sup> Pennsylvania Labor Relations Board, Annual Report for 1937, p. 26.

<sup>62</sup> Wisconsin Labor Relations Board, Report, *op. cit.* at n. 25, p. 9.

## CONCLUSIONS

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The preceding discussion has concerned itself primarily with institutional methods of dealing with rival union conflicts, and scarcely any attempt has been made to determine the degree of success attendant upon their application. It is not to be expected, therefore, that conclusive statements regarding the pragmatic superiority or inferiority of one approach as compared with another will be forthcoming. Nevertheless, a methodological survey inevitably gives rise to personal judgments as to substantive content. These opinions—and it is well to emphasize the very tentative nature of all opinion in these days—are set forth for what they are worth.

In the United States, the chief forums for the airing of inter-union controversies have been the courts of equity. The statistics compiled for the New York courts indicate how actively these tribunals have participated in the regulation and adjudication of such disputes. Intervention has ranged from the imposition of unilateral settlement, usually in the form of a prohibition, to the requirement of some action by all the parties concerned. The only court of last resort that exercised self-restraint in abstaining from embroilment in these bitter rival union conflicts, the New York Court of Appeals, has recently shown signs of veering about.

It is the present writer's belief that original determination of the intricacies of rival unionism should not be left to equity judges who generally have little more than a nodding acquaintanceship with labor problems. Not only is the personnel of the judiciary drawn largely from social groups whose knowledge of trade unions is apt to be gained from negotiating on the opposite side of a conference table, but the common law itself, with its emphasis on property rights, tends to predispose even the best intentioned of jurists to traditional modes of conduct. The persistence with which outmoded legal dogma clings to contemporary discussion is scarcely calculated to provide the vitality and clarity of vision necessary to

solve the problems of a new industrial order and the novelties of the modern employer-employee relationship.

This does not imply that there should be no right of ultimate judicial appeal, for that would be repugnant to the principles of American government. But before the courts are permitted to assume jurisdiction over controversies of the type under consideration, provision should be made for a careful sifting of facts by commissions of experts. When the latter have presented their reports, the courts are then free to adopt or disregard the advice tendered. In either event, the result is likely to be more realistic.<sup>1</sup> The combined Norris-La Guardia and National Labor Relations Acts, as presently interpreted by the United States Supreme Court, accomplish the stated desiderata in more or less satisfactory fashion, the former by severely restricting the role of courts in labor disputes, the latter through the establishment of an efficient fact-finding agency.

The point is often made that administrative intervention in industrial relations may lead, eventually, to an unfortunate, all-embracing governmental paternalism; and that, therefore, the federal and state governments should leave the parties to labor disputes to their own economic resources. This policy might be plausible if the alternative to governmental intercession were complete abstention. Actually, however, the alternative, and this is particularly true of rival union disputes, is drastic and often inept judicial interference. To the writer, the former course seems preferable.

The submission of labor disputes to quasi-judicial labor boards is not a novelty in the United States. The present legislative policy did not spring to life full blown, but was based upon years of accumulated experience. The National Labor Relations Act marked the culmination of a protracted search for a national labor policy. Although it was adopted prior to the contemporary split in the trade union movement, it does provide a method for at least the partial resolution of rival union controversy—the traditional demo-

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<sup>1</sup> This, at any rate, is the impression that the writer has gained from a comparison of the labor decisions of the United States Circuit Courts of Appeal prior to the passage of the National Labor Relations Act with those relating to the enforcement of orders of the National Labor Relations Board.

cratic electoral procedure. The importance of this extension of the ballot to industrial relations can hardly be exaggerated.<sup>2</sup> Chairman Madden of the N. L. R. B. had this to say:

In view of the relative apathy with which our citizens exercise their franchise in political elections, with a 50 percent vote from those eligible regarded as cause for satisfaction, I may startle you when I tell you that about 90 percent of the eligible workers vote in our elections. The important point, however, is that our workers are learning to settle their rivalries at the ballot box and not on the picket line. The value of this education in democracy cannot be overemphasized. I cannot help thinking how much more serious the consequences of the division in the labor movement would have been had there not been the safety valve afforded by the election machinery set up by the Board under the National Labor Relations Act.<sup>3</sup>

In view of the drastic innovations contained in the Act, it was inevitable that demands for its revision should have arisen. The internecine struggle between the C. I. O. and the A. F. of L., resulting in repeated criticism of the Act and its administration by those who would normally have been staunch supporters of both, lent more plausibility to the demands of the revisionists. The various proposals reflect a curious melange of constructive criticism and undisguised attempts to hinder or destroy the effectiveness of the Act. The present writer agrees with the N. L. R. B.<sup>4</sup> and a number of impartial commentators<sup>5</sup> in relegating the major portion of the suggestions to the latter category. Seemingly innocent prohibitions of "coercion from any source," grants of permission to the employer to demonstrate favoritism toward one of competing unions, the adoption of a mandatory craft unit rule, would all create obstacles that might well reduce the Board to impotence. The suggested removal of rival union disputes from the category of labor disputes over which the Board exercises jurisdiction would prove particularly disastrous.

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<sup>2</sup> The effect of the N. L. R. A. upon industrial warfare was carefully analyzed by the N. L. R. B. in its report to the Senate Committee on Education and Labor. See Senate Hearings, *op. cit.* at chap. xi, n. 6, p. 480. Although the very favorable conclusions therein reached must be appraised cautiously, they would seem to be not unjustified in the main.

<sup>3</sup> *Ibid.*, p. 130.

<sup>4</sup> *Ibid.*, pp. 467-614.

<sup>5</sup> "Amendments to the Wagner Act," 7 *I. J. A. Bulletin* 73 (1939); R. R. R. Brooks, *Unions of Their Own Choosing* (New Haven, 1939); "The Proposed Amendments to the Wagner Act," 52 *Harvard Law Review* 970 (1939).

Not even the partisans of the Act claim perfection for it. The N. L. R. B. has itself invited legislative clarification of several doubtful issues. The partly justified demand for the right of employer petition has recently been satisfied by revision of the rules and regulations of the Board. The proposal to write into the law the requirement of notice and the privilege of intervention to be given to all parties to a collective agreement before that agreement can be invalidated is not objectionable, but seems unnecessary in view of the decision of the United States Supreme Court in the *Consolidated Edison* case and the new Board regulations. Statutory specification regarding units of representation along the lines of the Globe doctrine, beyond introducing a measure of inflexibility, would do little harm.

Beyond this, however, there is need of a more careful delineation of the bounds of conduct permitted to minority unions. Despite popular exaggeration of the effects of rival union warfare, an employer may too often be placed in an exceedingly embarrassing position by the refusal of defeated unions to cease pressing for recognition. The insistence with which Senator Holman of Oregon, at the Senate hearings on amendments to the Act, stressed the plight of employers under these circumstances<sup>6</sup> may have appeared ludicrous at times, but there was a solid basis for complaint which should not be overlooked. To compel an employer to bargain with the representatives of the majority of his employees when he is unable to obtain redress against the coercive demands of a rival minority is inequitable. Regardless of the frequency with which such situations arise, there is an obvious need for rectification.

Without any pretence of competence in legal draftsmanship, the following amendment to the National Labor Relations Act is offered merely as a schematic prospectus for effectuating a needed revision.<sup>7</sup>

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<sup>6</sup> Senate Hearings, *op. cit.* at chap. xi, n. 6, pp. 47, 50, 51, 52, 193-198, 377, 379.

<sup>7</sup> Subsequent to the drafting of the proposal, a joint committee of the New York State Legislature, under the chairmanship of Assemblyman Ives, after an exhaustive inquiry into industrial relations in New York, recommended that "where the board has properly certified the representative of the employees of a particular employer, it should have the power to issue cease-and-desist orders against unions picketing against the board's certification when the public interest so requires. These cease-and-desist

A new section 8(B) should be added to the present Act, to read as follows:

It shall be an unfair labor practice for any employee, employees or labor organization to picket or patrol the plant of an employer, or boycott his products, or engage in any other concerted activities calculated to interfere with the manufacture, sale or delivery of his products, for a period of one year following the certification of exclusive bargaining representatives pursuant to section 9(c); *Provided*, that this section shall not apply to picketing, patrolling, boycotting or any other activities carried out by the order of or with the consent of the certified representatives: *Provided further*, that nothing in this section shall be construed to prohibit the solicitation of membership in any labor organization by methods other than the aforementioned.

Enforcement of section 8(B) would be in the same manner as the remainder of section 8, namely, through the issuance of cease and desist orders by the Board.

Many objections can doubtless be raised against this proposal. The N. L. R. B. has expressed its fear that the introduction of unfair employee practices into the Act might transform the Board "into a gigantic federal police court and seriously divert its time and energy from the basic objectives of the Act."<sup>8</sup> It is to be expected, however, that the necessity of invoking this provision would arise but infrequently, thus constituting but little further drain upon the Board's energy.<sup>9</sup>

More serious is the contention that the right to strike would be curtailed. Nothing in the section, it should be noted, forbids minority strikes. Of course, the possibility of securing a favorable outcome is considerably lessened by depriving minority strikers of their most efficient weapons. But it must be realized that the temper of the times is increasingly opposed to rival union picketing. Mayor LaGuardia of New York City, one of the sponsors of the federal anti-injunction act and generally regarded as a friend of labor, re-

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orders would be enforceable in the courts in the same manner as are similar orders against employers.

It has been argued that the elimination of cross-picketing might freeze the union status of employees of a given employer. In the committee's opinion, the proposal made above will produce no such result. The only effect will be to limit cross-picketing in the public interest." *N. Y. Times*, Jan. 26, 1940.

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<sup>8</sup> Senate Hearings, *op. cit.* at chap. xi, n. 6, p. 489.

<sup>9</sup> An additional procedural amendment would be necessary to permit employers and employees to file charges of violation of Section 8(B).

cently declared that cross-picketing was unjustified and would not be tolerated in the absence of a genuine controversy.<sup>10</sup> The United States Department of Justice has threatened<sup>11</sup> and actually begun to employ the Sherman Act against rival union activities which restrain commerce.<sup>12</sup> Unless labor itself acts to support reasonable restraints, its foes will secure drastic ones.<sup>13</sup>

The proposed amendment would have the effect of implementing the one-year certification rule adhered to by the Board, since no effective pressure for change of the bargaining agency could be utilized within the specified period. The question, too, of collective bargaining in the face of shifting majorities would to some extent be settled. The N. L. R. B. considered it "important to consider the advisability of clarifying the status of a contract where a majority of the membership in the contracting labor organization withdraw

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<sup>10</sup> *N. Y. Times*, Dec. 8, 1939.

<sup>11</sup> In a public letter, Mr. Thurman Arnold listed jurisdictional disputes as unreasonable restraints of trade. *N. Y. Times*, Nov. 20, 1939. Mr. Grant W. Kelleher, an aide to Mr. Arnold, clarified the intent of the Department as follows: "We will use the Sherman Act where disputes occur between two bona-fide unions or two locals of the same union or in any intra-labor jurisdictional dispute which places employer and employees in a position where they are helpless. It is beyond the power of a labor union, acting under the Wagner Act, to force or try to force by use of coercive means a change of affiliation on the part of the employees by tying up interstate commerce or by interfering in the flow of such commerce." *N. Y. World-Telegram*, Jan. 24, 1940.

<sup>12</sup> In New Orleans the A. F. of L. Building and Construction Trades Council was indicted for refusing to receive material delivered by the C. I. O. Transport Workers Union. *N. Y. Times*, Dec. 16, 1939. In New York City, Joseph P. Ryan and ten other officials of the International Longshoremen's Association were indicted on the charge of having attempted, by the use of the boycott, to force members of the C. I. O. United Retail and Wholesale Employees Union to leave the latter for the former union. *N. Y. Times*, Jan. 24, 1940.

<sup>13</sup> At a recent symposium of the National Lawyers' Guild, a good deal of attention was given to minority picketing. Judge Padway of the A. F. of L. upheld the right of unions to picket even after certification of a rival. Professor Herman Gray said that minority picketing might be justified if the picket signs clearly indicated to the public the basis for the action. Mr. Nicholas Kelley, counsel to the Chrysler Corporation, inadvertently advanced a good argument for permitting such picketing when he stated that the right to present grievances reserved to the minority by the Labor Relations Act was often forestalled by the majority control of the grievance machinery. See 5 *Labor Relations Reporter* 581 (1940). Notwithstanding these contentions, some restriction of minority picketing would appear to be both politically and socially expedient.

or shift their allegiance to another organization."<sup>14</sup> A new majority could not resort to industrial warfare to secure immediate bargaining rights. However, undue inflexibility is not introduced, since the new union might gain recognition even before the year was ended, either by persuading the employer, by peaceful means, that it was to his advantage to deal with it, or by convincing the Board that a new determination of representatives was an immediate necessity.<sup>15</sup>

The one-year proviso undoubtedly tends to freeze an organizational situation. It appears to be generally accepted, however, that notwithstanding the benefits that flow to labor from permitting full freedom of minority action,<sup>16</sup> satisfactory industrial relations cannot be achieved unless workers are willing to abide by their choice of representatives for a minimum period of time. One year is not excessive, and any injustice or dissatisfaction can be rectified within a reasonable time.

The most serious question raised by the proposed amendment is that of court review of Board certifications. If a defeated union is to be denied the privilege of contesting the verdict by resort to its economic strength, there is more reason to permit some review of the determination. There are alternative solutions, neither of them completely satisfactory. First, an additional proviso might be added to the law enabling an adversely affected labor organization to obtain direct judicial reconsideration of the certification, along the lines of the proposed section 9(D) contained in S. 1000.<sup>17</sup> The N. L. R. B. fears that this would seriously hamper its work by subjecting to lengthy litigation matters which should be settled speedily.<sup>18</sup> A second alternative is to qualify the inhibitions contained in the proposed section 8(B) so as to apply only in those cases in

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<sup>14</sup> Senate Hearings, *op. cit.* at chap. xi, n. 6, p. 487.

<sup>15</sup> The amendment does not solve the question that arises when an entire local, lock, stock and barrel, switches its allegiance from one parent to another. The outcome there would depend upon the theory of collective agreements adopted by the N. L. R. B. and the reviewing courts.

<sup>16</sup> The N. L. R. B. has presented well reasoned argumentation to this effect. Senate Hearings, *op. cit.* at chap. xi, n. 6, p. 526.

<sup>17</sup> *Supra*, p. 155.

<sup>18</sup> Senate Hearings, *op. cit.* at chap. xi, n. 6, pp. 583-587, 446, 460. There is unfortunately a great deal of truth in this position. However, the extent of the delay suggested by Mr. Fahy in his testimony would seem to be exaggerated. Furthermore, the importance of securing review might very well outweigh the damage caused by procedural procrastination.

which a defeated organization has had the opportunity to obtain court review. As the statute stands, this could occur only if the employer refused to bargain with a certified union and was thereupon cited for violation of section 8(5). Upon Board appeal to the Circuit Court of Appeals for enforcement of the order to bargain, the defeated union could intervene and present its case. The latter procedure is obviously too tortuous, and would require employer cooperation to an unpleasant degree. The former, again the lesser of two evils, is preferable, particularly in view of the fact that the American Federation of Labor has itself proposed it.

Chairman Madden of the N. L. R. B. implied that the effect of such an amendment could better be achieved through modification of the Norris-La Guardia Act to permit the issuance of injunctive decrees prohibiting minority picketing, etc., after certification.<sup>19</sup> To the writer, this seems far more dangerous than changing the National Labor Relations Act. The Norris Act has thus far withstood the attacks of hostile judges, but its revision might prove the signal for a new onslaught. In addition, it would seem to be safer to vest the power of enforcement in the N. L. R. B. and the Circuit Courts of Appeal than in the federal district courts.<sup>20</sup>

No new legislation, no revision of existing legislation, unless it be completely repressive, can do more than palliate some of the more glaring inequities that arise in the course of rival union warfare. Senator Thomas, the Chairman of the Senate Committee on Education and Labor, raised this question in the course of the hearings on the N. L. R. A.:

You see, our trouble here—we probably cannot pass an amendment to an act of Congress which will cure the rivalry between two labor organizations, but we can pass an amendment or an act of Congress which may cure any—

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<sup>19</sup> *Ibid.*, p. 136.

<sup>20</sup> This same conclusion is expressed by Professor Louis L. Jaffee in "Inter-Union Disputes In Search of a Forum," 49 *Yale Law Journal* 424 (1940), when he says that an "injunction based on a determination of the Labor Board is very different from an injunction which is part and parcel of a general system of repression," and continues: "The philosophy of the *Stillwell* case is as applicable as ever, in the absence of an administrative determination. The argument may be made, of course, that the union should seek such a determination rather than picket. But the time may not be ripe and if it is, then it is more to the point that the employer, rather than resorting to the court, should seek a remedy from the body whose special business it is to handle such questions."

thing the matter with the National Labor Relations Board, or we may abolish it . . . . We are all genuinely interested in correcting ills as far as we can, and if an amendment to the National Labor Relations Act will correct the ills which come from rival labor organizations, probably there would be a reason for amending the act, and a perfectly justifiable reason, but I am anxious to know if the act itself is responsible for this rivalry and if we can trace it to the act.<sup>21</sup>

Overwhelmingly, the Committee witnesses thought that the basic problem was not the amendment of the National Labor Relations Act, but rather the speedy reconciliation of the warring labor groups. At present, there appears to be little hope that this will materialize in the near future. The 1939 conventions of both factions ended in an atmosphere of mutual defiance, and despite the fervent expressions of the national administration nothing that has happened since offers even a ray of hope.

But it is also optimistic to expect that unification of the C. I. O. and A. F. of L. would eliminate rival unionism entirely. It is not unlikely, for one thing, that such an event would bring in its wake a wave of left-wing expulsions similar to that which took place in 1927-1929. The Communists, or any ideological group affected, might once again espouse a policy of rival unionism were "boring from within" thus made impracticable. Another disturbing factor is the spread of nationalistic animosities from the battle-scarred Continent, particularly in the heterogeneous urban trade unions. A third element is the continued existence of a great many independent labor organizations, affiliated with neither the C. I. O. nor the A. F. of L.<sup>22</sup>

Nor is there likely to be a complete cessation of jurisdictional warfare. Several recent disputes of this nature were settled only because of the threat of rival union intervention.<sup>23</sup> The same motive seems to have prompted the establishment of new arbitration machinery in the building trades.<sup>24</sup> Once that fear is removed through unification of the labor movement, jurisdictional difficulties

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<sup>21</sup> Senate Hearings, *op. cit.* at chap. xi, n. 6, p. 61.

<sup>22</sup> See the testimony of Morris H. Jones, *ibid.*, p. 951; of Louis B. Boudin, *ibid.*, p. 2994.

<sup>23</sup> These were between the Associated Actors and Artistes of America and the International Alliance of Theatrical Stage Employees, and between Locals 60 and 147 of the International Hod Carriers Union.

<sup>24</sup> *N. Y. Times*, August 12, 1939.

may be expected to increase, particularly in view of the rival claims of the new C. I. O. unions and the old A. F. of L. organizations.

One need not be possessed of a sixth sense, then, to foresee the continuation of rival union conflict in the United States. This would not be an unmitigated evil, however, if it were on a smaller scale. It is less easy for a complacent and corrupt union bureaucracy to maintain itself in power when challenged by vigorous opponents with appealing ideas. Their positions threatened, lethargic leaders must again don the mantle of crusading unionism. It has even been asserted that the secession of the C. I. O. was solely responsible for the spectacular gains of A. F. of L. organizational campaigns in the last few years, although this is a hypothesis scarcely susceptible of verification. If the future does not hold forth promise of eternal peace and harmony, it at least offers the consolation of an antidote to arteriosclerosis of the American labor movement.

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## APPENDIX I

INJUNCTIONS ISSUED BY NEW YORK COURTS  
IN RIVAL UNION DISPUTES

1. Aberon v. Raimist, 141 Misc. 774, 254 N. Y. S. 38 (1932). *Pendente lite*.
2. Adler v. Aumiller, N. Y. L. J., Apr. 24, 1934, p. 1975. *Pendente lite*.
3. Andear Amusement Corp. v. De Agostina, N. Y. L. J., Mar. 22, 1934, p. 1380. *Pendente lite*, Permanent.
4. Bart v. Markowitz, Kings County Clerk Index 19596 (1924). *Pendente lite*.
5. Baum v. Field, N. Y. County Clerk Index 3105 (1934). *Pendente lite*, Modified permanent.
6. Brooklyn United Theatres v. Kaplan, Kings County Clerk Index 21,662 (1928), *aff'd* 232 A. D. 828, 248 N. Y. S. 623, *mod.* 257 N. Y. 555, 178 N. E. 793 (1931). Permanent.
- \*7. Carnation Photoplay v. Basson, 216 A. D. 769, 215 N. Y. S. 824 (1925). *Pendente lite*, Reversing N. Y. L. J., Dec. 29, 1925.
- \*8. College Theatre v. Kaplan, 233 A. D. 870, 250 N. Y. S. 759 (1931). *Pendente lite*, Reversing Kings County Clerk Index 10076 (1931).
9. Coon v. Meinhart, 112 Misc. 650, 183 N. Y. S. 713 (1920). *Pendente lite*.
10. Cowan v. Beauty Culturists' Union, Kings County Clerk Index 14271 (1934). *Pendente lite*.
11. De Agostina v. Holmden, 157 Misc. 819, 285 N. Y. S. 909 (1935). *Pendente lite*, Permanent.
12. De Agostina v. Leff, N. Y. L. J., Jan. 27, 1936, p. 480. Permanent.
13. De Agostina v. Parkshire Ridge Amusement Corp., 155 Misc. 518, 278 N. Y. S. 622 (1935). Permanent.
14. Eagle Pencil Co. v. Carey, New York County Clerk Index 15,602 (1938). *Pendente lite*.
15. Edjomac Amusement Corp. v. Empire State Motion Picture Operators' Union, Inc., 156 Misc. 856, 283 N. Y. S. 6, *aff'd*. 247 A. D. 879, 288 N. Y. S. 756, *rev'd*. 273 N. Y. 647, 8 N. E. (2d) 329 (1937). *Pendente lite*, Permanent.
16. Esco Operating Co. v. Empire State Motion Picture Operators' Union, N. Y. L. J., Oct. 7, 1933, p. 1207. *Pendente lite*.
17. Esco Operating Corp. v. Kaplan, 144 Misc. 646, 258 N. Y. S. 303 (1932). Permanent.
18. I. J. Fox v. Gold, N. Y. County Clerk Index 39,400 (1931). *Pendente lite*, permanent.
19. Flakowitz v. Borzekowsky, Bronx County Clerk Index 2,624 (1924). *Pendente lite*.
20. Goldin v. Borzekowsky, Bronx County Clerk Index 2,801 (1924). *Pendente lite*.

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\* Injunction granted after previous denial.

- \*21. *Grow Lunch v. Kramberg*, N. Y. L. J., Nov. 25, 1935, p. 2056, Permanent. *Pendente lite* denied, N. Y. County Clerk Index 18,106 (1935).
22. *Herzog v. Cline*, 131 Misc. 816, 227 N. Y. S. 462 (1927). *Pendente lite*.
23. *Hoffman's Vegetarian Restaurant v. Lee*, 170 Misc. 815, 10 N. Y. S. (2d) 287 (1939). *Pendente lite*.
24. *Herschlag v. Schlansky*, N. Y. L. J., Nov. 3, 1934, p. 1634; Dec. 14, 1934, p. 2386. *Pendente lite*.
- \*25. *Horan v. Barrett*, N. Y. County Clerk Index 11,333 (1936). Permanent, *Pendente lite* denied.
26. *Ideal Cleaners and Dyers v. Kalos*, Kings County Clerk Index 19,412 (1933). *Pendente lite*.
27. *J. H. & S. Theatres v. Fay*, Permanent, *aff'd*. 236 A. D. 744, 258 N. Y. S. 993, *mod.* 260 N. Y. 315, 183 N. E. 509 (1931).
28. *Kimberg v. Wasserman*, 131 Misc. 816, 227 N. Y. S. 462 (1927). *Pendente lite*.
29. *Klappholz v. Goodleman*, Kings County Clerk Index 16,025 (1921). *Pendente lite*.
- \*30. *Klein v. Morrin*, *Pendente lite* denied, Permanent, N. Y. County Clerk Index 20,589, *aff'd*. in part, 248 A. D. 153, 288 N. Y. S. 1105, *aff'd*. 273 N. Y. 553, 7 N. E. (2d) 689 (1933).
31. *Kaufman v. Gold*, N. Y. County Clerk Index 4,289 (1932). Permanent.
- †32. *Major Upholstery Co. v. Pizer*, 95 N. Y. L. J. 2047 (1936). Withdrawn by stipulation.
33. *M. B. M. Baking Co. v. Obermeier*, N. Y. L. J., Sept. 23, 1931, p. 2681. *Pendente lite*.
34. *Michaels v. Hillman*, 112 Misc. 395, 183 N. Y. S. 195 (1920). *Pendente lite*, Permanent.
35. *Millinery Center Restaurant v. Lehman*, N. Y. County Clerk Index 10,789 (1934). *Pendente lite*.
36. *Municipal Dye Works v. Kalos*, Kings County Clerk Index 21,250 (1933). *Pendente lite*.
37. *B & M Cleaners and Dyers v. Kalos*, N. Y. L. J., Oct. 28, 1933. *Pendente lite*.
38. *Nann v. Raimist*, Permanent, *aff'd*. 228 A. D. 856, 241 N. Y. S. 832, *aff'd*. 255 N. Y. 307, 174 N. E. 690 (1931).
39. *Nathan's Famous v. Winter*, Kings County Clerk Index 8820 (1934). *Pendente lite*.
40. *Kingsbridge v. Christel*, N. Y. L. J., Mar. 6, 1929, *aff'd*. 226 A. D. 799. *Pendente lite*.
41. *National Protective Association v. Cumming*, 53 A. D. 227, 65 N. Y. S. 946, *aff'd*. 170 N. Y. 315, 63 N. E. 369 (1902). Permanent.
- †42. *Nuremberg v. Associated Fur Coat Manufacturers*, N. Y. L. J., July 6, 1933, p. 52. Settled.
43. *133-2nd Ave. Amusement Corp. v. Empire State Motion Picture Operators' Union*, N. Y. County Clerk Index 21,000 (1935). *Pendente lite*.

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\* Injunction granted after previous denial.

† Discontinued before adjudication.

44. Paramount Beauty Shoppe v. Beauty Culturists' Union, 93 N. Y. L. J. 1769 (1935). *Pendente lite*.
45. Park Circuit, Inc. v. Kaplan, Kings County Clerk Index 13,043 (1930). *Pendente lite*.
46. Park Lane Baking Co. v. Christel, N. Y. L. J., July 11, 1930, p. 1865. *Pendente lite*.
47. Possehl v. Burpo, N. Y. County Clerk Index 7260 (1937). Permanent by agreement.
48. Probolsky v. Rubinberg, Kings County Clerk Index 3,900 (1923), *aff'd.*, 207 A. D. 830, 201 N. Y. S. 938 (1923).
49. Public Baking Co. v. Stern, 127 Misc. 229, 215 N. Y. S. 537 (1925). *Pendente lite*, Permanent denied.
50. Purity Restaurant Inc. v. Doe. Kings County Clerk Index 6,126 (1939). *Pendente lite*, reversed on trial.
51. Regun Operating Co. v. Kaplan, N. Y. County Clerk Index 11,378 (1930). *Pendente lite*.
52. Reform Club v. Laborers' Union Protective Society, 29 Misc. 247, 60 N. Y. S. 388 (1899). *Pendente lite*.
53. Rifkin v. Cline, Kings County Clerk Index 5452 (1928). *Pendente lite*.
54. Roosevelt Amusement Corp. v. Empire State Motion Picture Operators' Union, 144 Misc. 644, 258 N. Y. S. 240, *affirmed* 231 A. D. 872 (1930). *Pendente lite*.
55. Unity Amusement Corp. v. Empire State Motion Picture Operators' Union, 144 Misc. 644, 258 N. Y. S. 240, *aff'd.* 231 A. D. 872 (1930). *Pendente lite*.
56. Rosekay Amusement Co. v. Holmden, N. Y. L. J., Sept. 10, 1934, p. 691. *Pendente lite. Aff'd.* 243 A. D. 82, 276 N. Y. S. 238.
57. Bert Amusement Co. v. Holmden, N. Y. L. J., Sept. 10, 1934, p. 691, *Pendente lite. Aff'd.* 243 A. D. 81, 276 N. Y. S. 236.
58. Rosen Bros. v. Mackler, N. Y. L. J., Mar. 27, 1924. *Pendente lite*.
59. Schlessinger v. Messing, N. Y. L. J., Dec. 17, 1924. *Pendente lite*.
60. Sanders v. Kaplan, Kings County Clerk Index 385 (1927). *Pendente lite*.
61. Schor v. Borzekowsky, Bronx County Clerk Index 2,783 (1924). *Pendente lite*.
62. Sherman v. Abeles, 150 Misc. 497, 269 N. Y. S. 849, *aff'd.* 241 A. D. 676, 269 N. Y. S. 864, *rev'd.* 265 N. Y. 383, 193 N. E. 241 (1935). *Pendente lite*.
63. Sigman & Cohen v. American Shoe Workers' Union, N. Y. L. J., Jan. 7, 1925, p. 1322. *Pendente lite*.
64. Somerspitz v. Fleisher, N. Y. L. J., Jan. 4, 1924, p. 1182; Apr. 16, 1924. *Pendente lite*.
65. Stalban v. Freedman, 171 Misc. 106, 11 N. Y. S. (2d) 343 (1939).
66. Spinner v. Paolillo, N. Y. L. J., May 26, 1939, p. 2442. *Pendente lite*.
67. Steinkritz Amusement Corp. v. Kaplan, 232 A. D. 834, 248 N. Y. S. 624, *aff'd.* 257 N. Y. 294, 178 N. E. 11 (1931). Permanent, modified.

68. *Steven's Cafeteria v. Halperin*, N. Y. L. J., April 24, 1935, p. 2107. *Pendente lite*.
69. *Stillwell Theatre Corp. v. Kaplan*, 140 Misc. 142, 249 N. Y. S. 122, *aff'd*. 235 A. D. 738, 255 N. Y. S. 715, *rev'd*. 259 N. Y. 405, 182 N. E. 63, *cert. den.* 288 U. S. 606, 53 S. Ct. 397 (1932).
70. *Touraine Knitwear Co. v. Hillman*, N. Y. L. J., May 8, 1936, p. 2386. *Pendente lite*.
71. *United Baker Workers' Union v. Messing*, N. Y. L. J., Feb. 19, 1926, p. 2040, *aff'd*., A. D., Apr. 24, 1927. *Pendente lite*, Permanent denied.
- \*72. *United Cloak and Suit Designers v. Sigman*, *Pendente lite* denied, Permanent granted 218 A. D. 367, 218 N. Y. S. 483 (1926).
73. *Traube Dry Cleaning v. Kalos*, Kings County Clerk Index 21,081 (1933). *Pendente lite*.
74. *Vogel v. Greenspan*, N. Y. L. J., Nov. 26, 1924, p. 783. *Pendente lite*.
75. *Westbury Sportswear Mills v. Dubinsky*, Kings County Clerk Index 2,975 (1934). *Pendente lite*.
76. *Wilner v. Bless*, 216 A. D. 710, 214 N. Y. S. 939, *aff'd*. 243 N. Y. 544, 154 N. E. 598 (1926).
77. *Winthrop Baking Co. v. Bless*, N. Y. L. J., Oct. 3, 1927, *aff'd*. 222 A. D. 763, 225 N. Y. S. 923 (1928). *Pendente lite*.
78. *Wolchak v. Wiseman*, 145 Misc. 268, 259 N. Y. S. 225 (1932). *Pendente lite*.

## APPENDIX II

### INJUNCTIONS DENIED BY NEW YORK COURTS IN RIVAL UNION DISPUTES

1. *Ansley Radio Corp. v. Carey*, N. Y. L. J., July 22, 1937. *Pendente lite* denied.
2. *Bacinski v. Douglass*, N. Y. L. J., Nov. 30, 1937. *Pendente lite* denied.
3. *Bedford Cleaning and Dyeing v. Kalos*, Kings County Clerk Index 21,649 (1933). *Pendente lite* denied.
4. *Bergman v. Levenson*, N. Y. L. J., April 28, 1939, p. 1955. *Pendente lite* denied, 876-a.
5. *Carnation Photoplay v. Basson*, N. Y. L. J., Dec. 29, 1925, p. 1264. *Pendente lite* denied, *rev'd*. 216 A. D. 769, 215 N. Y. S. 824.
6. *College Theatre v. Kaplan*, Kings County Clerk Index 10,076 (1931). *Pendente lite* denied, *rev'd*. 233 A. D. 870, 250 N. Y. S. 759.
7. *Crawford Clothes v. Frankel*, N. Y. County Clerk Index 19,663 (1937). *Pendente lite* denied.
8. *De Agostina v. Odeon Roosevelt Corp.*, N. Y. County Clerk Index 46,128 (1933). *Pendente lite* denied.
- \*9. *Edjomac Amusement Corp. v. Empire State Motion Picture Operators' Union*, Reversal of permanent, 273 N. Y. 647, 8 N. E. (2d) 329 (1937).

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\* Injunction granted after previous denial.

10. Empire State Motion Picture Operators' Union v. J. R. S. Theatre Corp., Kings County Clerk Index 19,920 (1932). *Pendente lite* denied.
11. F. Everett Inc. v. Penna, N. Y. County Clerk Index 17,146 (1938). Withdrawn.
12. Glover v. Screen Theatres, N. Y. County Clerk Index 511 (1936). *Pendente lite* denied.
13. Goldin v. Borzekowsky, Bronx County Clerk Index 2801 (1924). *Pendente lite* vacated on trial.
14. Grow Lunch v. Kramberg, N. Y. County Clerk Index 18,106 (1935). *Pendente lite* denied.
- \*15. Herschlag v. Schlansky, N. Y. L. J., Dec. 14, 1934, p. 2386. Permanent denied.
16. Hoffman's Cafeteria v. Weissman, Kings County Clerk Index 18,293 (1933). *Pendente lite* denied.
17. Horan v. Barret, N. Y. County Clerk Index 11,333 (1936). *Pendente lite* denied.
18. Independent Gas and Electric Union v. Consolidated Edison Co., N. Y. County Clerk Index 11,767 (1938). *Pendente lite* denied.
19. International Brotherhood of Building Trades Unions v. Doe, Kings County Clerk Index 5,298 (1938). *Pendente lite* denied, 876-a.
20. Jones Foods Inc. v. Doe, N. Y. L. J., May 16, 1939, June 15, 1939, p. 2771. *Pendente lite* denied, 876-a.
21. Klein v. Morrin, N. Y. County Clerk Index 20,589 (1933). *Pendente lite* denied.
22. Meyer's Candies v. Doe, N. Y. L. J., Feb. 5, 1936, p. 663. *Pendente lite* denied.
23. Miele v. Sheet Metal Workers' International Association, Supreme Court, Queens, 1937. *Pendente lite* denied, 876-a.
24. Murphy v. Practical Bookbinding Co., N. Y. County Clerk Index 12,300 (1938). Permanent denied.
- \*25. National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902). Permanent injunction reversed.
26. Nigberg v. Bakery and Confectionery Workers' Union, Kings County Clerk Index 103 (1924). *Pendente lite* denied.
27. N. & R. Theatres v. Basson, 127 Misc. 271, 215 N. Y. S. 157 (1925). *Pendente lite* denied.
- \*28. Public Bakery Co. v. Stern, 127 Misc. 229, 215 N. Y. S. 537 (1935). Permanent denied.
- \*29. Purity Restaurant Inc. v. Doe, Kings County Clerk Index 6126 (1939). *Pendente lite* vacated on trial.
- \*30. Reform Club v. Laborers' Union Protective Association, 29 Misc. 247, 60 N. Y. S. 388 (1899). Permanent denied.
- \*31. Probolsky v. Rubinberg, Kings County Clerk Index 3,900 (1923). *Pendente lite* vacated on trial.
32. Rose Grill v. Oberkirsh, Kings County Clerk Index 1,833 (1939). *Pendente lite* denied.
- \*33. Rosen Bros. v. Mackler, Kings County Clerk Index 5,075 (1924). Permanent denied.

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\* Injunction previously issued vacated.

34. Saito v. Waiters' Union, N. Y. L. J., April 12, 1939, p. 1676. *Pendente lite* denied.
- \*35. Schlessinger v. Messing, N. Y. L. J., Dec. 17, 1924. Permanent denied.
- \*36. Sherman v. Abeles, 265 N. Y. 383, 193 N. E. 241 (1935). *Pendente lite* vacated by Court of Appeals.
37. Stone Cleaning and Pointing Union v. Russel, 77 N. Y. S. 1049, 38 Misc. 513 (1902). *Pendente lite* denied.
38. Tallman v. Gaillard, 57 N. Y. S. 419, 27 Misc. 114 (1899). *Pendente lite* denied.
39. Times Square Concessions v. Meyer, N. Y. County Clerk Index 31,075 (1938). *Pendente lite* denied, 876-a.
- \*40. United Baker Workers' Union v. Messing, N. Y. L. J., Feb. 19, 1926, p. 2040. Permanent denied.
41. United Cloak and Suit Designers v. Sigman, 218 A. D. 780, 218 N. Y. S. 483 (1926). *Pendente lite* denied.
- \*42. Stillwell Theatre Corp. v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932). Permanent vacated by Court of Appeals.
- \*43. Vogel v. Greenspan, N. Y. L. J., Nov. 26, 1934, p. 783. *Pendente lite* vacated on trial.

### APPENDIX III

#### SUITS BROUGHT BY ALLIED MOTION PICTURE OPERATORS' UNION TO ENFORCE CLOSED-SHOP AGREEMENTS

1. De Agostina v. Edjomac Amusement Corp., N. Y. County Clerk Index 30,219 (1935). Denied.
2. De Agostina v. Estates Operating Co., N. Y. L. J., Dec. 7, 1925, p. 2296. Denied.
3. De Agostina v. Haruth Amusement Co., Bronx County Clerk Index 2,618 (1935). Granted.
4. De Agostina v. Leff, N. Y. L. J., Jan. 27, 1936, p. 480. Granted.
5. De Agostina v. Odeon-Roosevelt Corp., N. Y. County Clerk Index 46,128 (1933). Denied.
6. De Agostina v. Parkshire Ridge Amusement Corp., 155 Misc. 518, 278 N. Y. S. 622 (1935). Granted.
7. De Agostina v. Signal Theatre, Kings County Clerk Index 8,489 (1935). Denied.
8. Glover v. Estates Operating Co., N. Y. L. J., Feb. 5, 1936, p. 663. Denied.
9. Glover v. Pulch-Hubner Amusement Corp., N. Y. County Clerk Index 16,065 (1936). Granted.
10. Glover v. Screen Theatres, Kings County Clerk Index 511 (1936). Denied.
11. Glover v. Signal Theatre Corp., Kings County Clerk Index 9431 (1936). Denied.
12. Glover v. Spur Amusement Corp., N. Y. County Clerk Index 8,616 (1936). Granted.

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\* Injunction previously issued vacated.

## APPENDIX IV

SUITS BROUGHT BY EMPIRE STATE MOTION  
PICTURE OPERATORS UNION, INC. TO  
ENFORCE CLOSED-SHOP AGREEMENTS

1. Empire State v. Jamosa Holding Co., Kings County Clerk Index 10,764 (1937). Denied.
2. Empire State v. J. R. S. Theatre Co., Kings County Clerk Index 19,920 (1932). Denied.
3. Empire State v. Mangood, Kings County Clerk Index 8,527 (1937). Denied.
4. Empire State v. Parkshire Ridge Amusement Corp., Kings County Clerk Index 18,577 (1934). Denied.
5. Empire State v. Quinral Amusements, Kings County Clerk Index 4,829 (1937). Denied.
6. Empire State v. Yost, Kings County Clerk Index 569 (1937). Denied.

## APPENDIX V

SUITS BROUGHT BY LOCAL 306, INTERNATIONAL  
ALLIANCE OF THEATRICAL AND STAGE  
EMPLOYEES, TO ENFORCE CLOSED-  
SHOP AGREEMENTS

1. Sherman v. Bandbox Theatre, Bronx County Clerk Index 6,970 (1933). Granted.
2. Sherman v. Brecher, N. Y. County Clerk Index 30,566 (1933). Granted.
3. Sherman v. City Theatres, N. Y. County Clerk Index 9,267 (1934). Withdrawn.
4. Sherman v. Entertainment Holding Corp., N. Y. County Clerk Index 22,103 (1933). Granted.
5. Sherman v. Reade, N. Y. County Clerk Index 16,651 (1933). Granted.
6. Sherman v. Reliable Holding Co., N. Y. County Clerk Index 30,567, 38,930, 40,929 (1933). Discontinued.
7. Sherman v. Rudhelan, N. Y. County Clerk Index 30,388 (1933). Granted.
8. Sherman v. Washington Bridge Theatre, N. Y. L. J., Feb. 15, 1934, p. 780. Discontinued.
9. Pomerantz v. Art Amusement Corp., N. Y. L. J., Feb. 15, 1934, p. 780. Discontinued.
10. Sherman v. Bosroad Theater, N. Y. L. J., Feb. 15, 1934, p. 780. Discontinued.
11. Zoltowski v. 15th St. Amusement Corp., N. Y. L. J., Feb. 15, 1934, p. 780. Discontinued.
12. Bender v. Sanders Theater, N. Y. L. J., Feb. 15, 1934, p. 780. Discontinued.

13. Katz v. Rhinelander Theatre Corp., N. Y. L. J., Feb. 15, 1934, p. 780. Discontinued.
14. Pasti v. Iris Amusement Corp., N. Y. L. J., Feb. 15, 1934, p. 780. Discontinued.
15. Lundnes v. Eagle Moving Picture, N. Y. L. J., Feb. 15, 1934, p. 780. Discontinued.
16. Sherman v. Haring Amusement Corp., N. Y. L. J., Feb. 15, 1934, p. 780. Discontinued.
17. Gunerman v. Bert Amusement Corp., N. Y. L. J., Feb. 15, 1934, p. 780. Discontinued.
18. Weiner v. Treplah Amusement Corp., N. Y. L. J., Feb. 15, 1934, p. 780. Discontinued.
19. Weiner v. Rojo Amusement Corp., N. Y. L. J., Feb. 15, 1934, p. 780. Discontinued.
20. Pearlman v. Amus Amusement Corp., N. Y. L. J., Feb. 15, 1934, p. 780. Discontinued.

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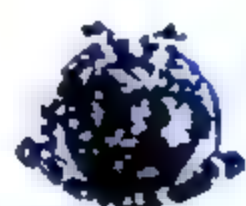
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